Efficient Copyright Infringement

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ABSTRACT

Copyright infringement is said to be socially costly because it robs owners of due recompense and depresses incentives for creative production. This Article contends that in order to achieve copyright's goal of maximizing cultural production, this dominant story of infringement's costs requires alongside it a counter-story identifying the rare but important instances where copyright infringement enhances social welfare. Part I explains the need for an account of the novel notion of efficient copyright infringement. Other types of unlawful conduct may also be beneficial, but copyright in particular warrants exploration of efficient infringement because maximizing creative production requires some level of unauthorized use, and because copyright's political economy tilts in favor of expanding owners' rights. Part II explores efficient copyright infringement's domain, showing that unauthorized use of protected works of authorship will be prosocial where traditional private ordering is unavailable (or strongly undesirable) to facilitate a given use, and where that use is welfare-enhancing. Part III outlines broadly how a law of efficient copyright infringement might look. It first explains how the Copyright Act has failed to fully account for beneficial unauthorized use. It then considers a variety of ways that copyright damages could be structured to better accommodate efficient infringement. The Article concludes by situating this argument in the context of a growing literature that explores the surprising and underappreciated upside of unauthorized use of copyrighted works of authorship.

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Transgression is supposed to cause bad outcomes. Countless morality tales remind us that those who ignore flout wisely established social norms tend to meet unhappy fates.[2] And this is especially true of transgressing legal boundaries. After all, while the state regulates conduct for many reasons, primary among them is to deter and sanction socially costly behavior. And usually, breaking the law does make the world a worse place. Entering someone else's real property without permission affronts their sense of ownership and security, and can bring civil and criminal sanctions down on the trespasser. Murder ends lives, brings tragedy to survivors, and lands perpetrators on death row. The same holds true of private law, where breaching contracts betrays expectations, undermines the stability of commercial arrangements, and leads to litigation and liability.

But law's broadly drawn categories cannot account for the myriad variations of human behavior. Hence transgressing law's boundaries can, despite moral instincts to the contrary, cause net positive outcomes. Trespassing on land in order to avert a catastrophe or to engage in political protest will likely produce social benefits well in excess of any harm to the landowner. Killing a remorseless psychopath who is going to slaughter innocent civilians may do more good than harm. And promisors may find it more cost-effective to breach a contract and pay damages than to fully perform. These counterexamples may be anomalous, but they still illustrate that at least on rare occasions, engaging in otherwise illicit conduct may actually make the world a better place.

Copyright law follows along these lines. According to the official story, the interests of copyright owners and society exist in a cosmic alignment. Authors enjoy incentives to create thanks to exclusive rights in their works of authorship, and the public gets to enjoy the fruits of the resulting creative labors. Infringement, the official story goes, disrupts this symbiosis. Infringement harms owners because it robs them of their ability to extract value from their works of authorship. Infringement also harms society because it depresses incentives to own and acquire works, leading to less creative

[2] The Boy Who Cried Wolf furnishes a well-known example. If you lie enough times, it reminds us, you may end up as dinner for feral canines.

production and an impoverished cultural environment for us all. This leads to the notion that strict enforcement of infringement solves both of these problems. Heavy copyright damages make sure copyright owners get their due, and also make sure society enjoys the continued progress of science that is the constitutional telos of the copyright system. In copyright, James Madison nicely summed up, "the public good fully coincides with the claims of individuals."[3]

The surface appeal of this sanguine account, though, masks a much more complex reality. In a nontrivial number of instances, violating copyright law—like violating other laws—can serve socially beneficial ends. The exposure of a company's fraudulent practices may necessarily entail unauthorized publication of their copyright-protected internal communications. Infringement may also lead to public dissemination of culturally enriching materials kept under wraps by owners who want to suppress their dissemination. Outsider artists may trade on the illegality of their appropriation of others' works as a constituent feature of their own creation, requiring infringement to create their work. Infringement also creates social welfare where it simply enables beneficial uses that wouldn't have happened otherwise, such as where the mere act of acquiring permission for a use proves prohibitively costly in comparison its internalized value. And even owners may benefit from unauthorized copying of their works, such as where the copies serve as a powerful advertisement for the owner's brand.

Law generally seeks to negotiate the rare but important occasions on which otherwise prohibited behavior produces social value. Courts have carved out exceptions to trespass law in the interest of avoiding catastrophe or death, preserving health, or encouraging democratic debate.[4] Killing in order to save one's own life, or that of third parties, is subject to a full affirmative defense in all American

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[3] James Madison, THE FEDERALIST No. 43.

[4] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (holding that affirmative speech rights under the California Constitution allowed individuals to demonstrate peacefully in private areas open to the public); State v. Shack, 277 A.2d 369 (N.J. 1971) (dismissing trespass suit against defendants who entered private property without permission in order to provide migrant workers health-care and legal services).

jurisdictions, albeit under divergent circumstances.[5] And contract law typically limits recovery to expectation damages in cases of nonperformance in order to avoid overcompensating promisees—thereby encouraging "efficient breach".[6] Law has exhibited mixed responses to beneficial transgression. Property law generally allows trespass to save lives, but expresses mixed results when it comes to limiting the right to exclude in the interest of promoting other values.[7] States' standards for reasonable self- or other-defense vary widely.[8] And recent work has cast doubt on the wisdom of contract law's efficient breach doctrine, suggesting that it may underestimate the social costs of weakening promisees' ability to rely on agreements.[9]

Copyright's notion of beneficial wrongdoing—what I call "efficient copyright infringement"—is similarly conflicted. Some authors have touched on the possibility that unauthorized uses of protected works of authorship can create social welfare. Jessica Litman's work on personal use has highlighted the extent to which formally infringing acts can generate small but meaningful social welfare gains.[10] Rebecca Tushnet has outlined the numerous ways that verbatim copying can facilitate self-expression.[11] Sonia Katyal and Eduardo Penalver's recent discussion of "altlaws" catalogued some of the ways that infringing conduct can produce social benefits.[12] But no work as yet has articulated a fully theorized and conceptually unified account of efficient copyright infringement, or explored how such a notion should be realized in positive law.

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[5] Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law sec. 5.7(a), at 454 (2d ed. 1986).

[6] *See, e.g.*, Lake River Corp. v. Carborundum Co., 769 F.2d 1284 (7th Cir. 1985) (Posner, J.) (vacating district court enforcement of liquidated damages clause in a services contract and remanding for remedy based on efficient breach theory).

[7] *See* Ben DePoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090 (describing variance in exceptions to right to exclude).

[8] Am. Jur. Homicide sec. 134 (cataloguing different state approaches to killing in self-defense).

[9] *Cf., e.g.*, Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568 (2006-07) (articulating an alternative to the efficient breach approach that would allow promisees the option to choose between performance and breach with disgorgement of promisor's profits).

[10] Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

[11] Rebecca Tushnet, *Copy This Essay*, 114 YALE L.J. 535 (2004).

[12] SONIA KATYAL & EDUARDO PENALVER, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (2010).

Given that infringement's welfare-enhancing possibilities remain undertheorized, it is unsurprising that the Copyright Act itself also lacks a coherent doctrinal account of efficient copyright infringement. The fair use doctrine valiantly attempts a start at protecting unauthorized but socially beneficial uses, and other aspects of the copyright statute provide targeted protections that often apply to limited classes of users, such as its safe harbors for certain kinds of reproductions by libraries.[13] But as I explain in more detail below,[14] these doctrines still leave wide swaths of productive but unauthorized use open to infringement liability. The mismatch between the Copyright Act and the idea of efficient infringement works to the detriment of owners as well as users. It means not only that law subjects many productive uses to outsized penalties, but also that it may undercompensate owners by allowing well capitalized users to extract value from protected works without having to pay a dime.

The absence of a unified account of efficient infringement is all the more troubling because copyright, more than other areas of private law, produces relatively more positive spillovers that redound to the public's benefit.[15] As the Supreme Court has repeatedly stressed, the Copyright Act may make owners richer, but that is only a means to its true constitutional end of creating a culturally richer society.[16] Crafting a regime of efficient copyright infringement will safeguard the kinds of uses that generate the most positive externalities for the public, at least insofar as they can or should not be acquired via traditional licensing. Articulating a prominent notion of efficient copyright infringement also serves the important political and rhetorical function of cutting back against the popular theme that all infringement is intrinsically wrongful, restoring balance to a Copyright Act that increasingly tilts in favors of owners and content industries.

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[13] 17 U.S.C. sec. 108.

[14] See Part III.A, "The Well Meaning Failures of the Copyright Act," *infra*.

[15] *See* Brett Frischmann & Mark Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (discussing positive externalities—spillovers—as a common and desirable feature of intellectual property systems, rather than problems in need of a solution).

[16] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.").

This Article elaborates efficient copyright infringement in three steps. Part I describes the domain of efficient copyright infringement, first explaining why copyright demands an account of efficient infringement, and then providing a parsimonious definition of the term. Part II develops the notion of efficient copyright infringement in more detail. It outlines copyright infringement's capacity to create costs and benefits that are social and private, static and dynamic. It then develops a taxonomy of circumstances under which private ordering is either an unavailable or strongly undesirable means of facilitating uses of works of authorship. Part III examines the Copyright Act through the lens of the efficient copyright infringement paradigm. This Part first explains why the Act does not fully account for welfare-enhancing unauthorized use. It then broadly sketches some doctrinal innovations that could ameliorate this problem, including a novel approach to compulsory licenses that calibrates the amount of the license to the value generated by a use. Finally, the Conclusion places efficient copyright infringement in broader context, linking it to an emerging literature that is beginning to explore the underappreciated upside of copying, and the foundational implications copying's upside may have for using traditional property strategies to encourage creative production.

I. JUSTIFYING EFFICIENT COPYRIGHT INFRINGEMENT

It initially seems puzzling that copyright would require a category of efficient infringement.[17] We don't, by contrast, subject the enforcement of rights in physical property to a cost-benefit analysis. If I have an extra iPhone that is sitting in my desk drawer gathering dust, and you desperately want and need an iPhone but can't afford it, law doesn't entitle you to take it, even though there's a pretty good argument that such a transfer would be socially beneficial. Instead, private property—physical and intellectual—tends to be governed by in rem rules of exclusion. These rules say that with respect to a particular thing (the res), owners get to exclude just about anyone they

[17] I use "efficiency" here to refer broadly to the maximization of social welfare (hence more or less interchangeably with "welfare-enhancing"). The notion of efficiency in the copyright setting can be refined somewhat to refer to the maximization of social welfare via creative production. For a good overview—and critique—of different formulations of the term "efficiency," see Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 75-97 (1992).

want, on just about any terms they want, regardless of whether a reasonable person would think the owner is putting their property to the highest value use.[18]

Examined more closely, though, the differences between physical and intellectual property illuminate why copyright not only permits, but demands, an account of efficient infringement. Private physical property has public-regarding dimensions,[19] but exists largely in order to enable owners to internalize as much value as possible from the things they own.[20] Strong rights to exclude facilitate this dynamic by preserving owners' expectations, thereby encouraging investment, and also by preventing overexploitation and depletion of scarce resources. Copyright's goal, by contrast, is not the accretion of private wealth but the encouragement of cultural production.[21] Its exclusive rights exist as a means to this end, and have to be carefully calibrated in order to maximize cultural production.[22] Too little protection will mean that owners lack sufficient incentives to continue creating or acquiring future works. Too much protection means that there will not

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[18] *See* Henry Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property*, 31 J. LEGAL STUD. 453, 454-55 (2002) (comparing exclusion and governance strategies for managing property). Physical property owners' rights are far from absolute. Doctrines like adverse possession (for real property) and accession (chattels) provide for title transfer to beneficial users under certain narrowly drawn conditions.

[19] *See* Eric T. Freyfogle, *Private Property: Correcting the Half-Truths*, PLAN. & ENVTL. L., Dec. 10, 2007, at 3, 7 (observing the public/private character of property entitlements).

[20] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347 (1967) (arguing that property rights emerge in order to allow owners to internalize as much value as possible from the exploitation of their res).

[21] United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statute, makes reward to the owner a secondary consideration.").

[22] WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 71-84 (2003) (formally modeling the cost/benefit structure of copyright's incentive system); Matthew Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 Tul. L. Rev. 187, 198-217 (2006) (discussing the impacts on creative production of changes in the scope of copyright).

be enough breathing space to enable the kind of distributed collaboration over time that is the lifeblood of social creativity.[23]

The hard question, of course, is at what level ownership rights in works of authorship must be calibrated to encourage the optimal level of cultural production. The answer to this empirical question lies well beyond the scope of this paper. Indeed, it has eluded scholars to date.[24] We can be confident, though, that law's attempts to effect this calibration are far from perfect. The Copyright Act offers a one-size-fits-all scheme, rather than extending protection only where it is prosocial. Yet this imperfection is part of the design of the copyright system, rather than something to be suppressed. Intellectual property is designed in large part to produce socially positive externalities, rather than to enable complete internalization of the value generated by works of authorship or inventions.[25] Moreover, the inevitable imperfection of calibrating copyright at a level that maximizes cultural production means that some unauthorized use will always be necessary to achieve the optimal level of creativity.[26]

This is where efficient copyright infringement comes in. Since copyright is a state-created system designed to create artificial scarcity in order to incentivize cultural production,[27] the contours of that system require constant adjustment in order to make sure it achieves

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[23] Jonathan Barnett, *What's So Bad About Stealing?*, 4 J. TORT L. 1, 21 (characterizing creative production as "a cumulative process consisting of an unfolding sequence of first-mover and *n*-mover creations").

[24] The most exhaustive study to date on whether the current level of copyright protection maximizes cultural production returned indeterminate results. Raymond Ku, et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669 (2009).

[25] *See* Frischmann & Lemley, *supra* note 15 (observing that the leakiness of IP rights is a crucial part of their capacity to create social welfare).

[26] Barnett, *supra* note 23 at 22 ("Some positive level of tolerated theft is an essential component of any transaction structure that maximizes the social wealth generated by creative production.").

[27] Dan Burk, *Law and Economics of Intellectual Property: In Search of First Principles* 7, UC Irvine School of Law Legal Studies Research Paper No. 2012-60, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2113975 ("The intellectual property right … places a legal fence around goods that cannot physically be fenced off. In economic terms, it gives the owner of the intellectual property market power: the ability to raise prices and restrict output—in this case, above the marginal distribution cost of a public good. Market power is associated with the economics of monopolization[.]").

its desired end. Efficient copyright infringement facilitates this in two ways. Substantively, it creates space for flexibility within copyright law itself, so that enforcement of owners' rights can be aligned more accurately with copyright's social purpose. And symbolically, it serves as a reminder that strict enforcement of owners' copyrights is not an unalloyed good, but merely one possible option in a complex conversation about how best to maximize cultural production.

Framing this discussion in terms of efficient copyright infringement, though, loads the conversation in the direction of users', rather than owners', prerogatives. One might reasonably wonder why the aforementioned need to constantly recalibrate the balance between private rights and the public domain requires attention only to the possible efficiency of unauthorized use, rather than authorized use that might be better off privatized. This is a plausible rejoinder. It is entirely possible that some aspects of fair use, for example, underprotect owners in a socially counterproductive way. Although this Article addresses the problem of owners' undercompensation to some extent below,[28] full examination of that issue is not possible in this space. And there are at least two reasons to think that solicitude for unauthorized use, rather than underdevelopment of owners' rights, warrants particular concern.

First, the distinctive political economy of intellectual property gives us reason to suspect that private rights in information trend in favor of owners at the expense of users. Copyright is particularly vulnerable to capture by the content industries that are its primary beneficiaries. Those industries, which own numerous copyrights and benefit disproportionately from stronger exclusive rights, have an obvious incentive to lobby for rent-seeking legislation.[29] That copyright is exclusively a feature of federal law makes this task easier, since its reform requires only a single legislative change (rather than the coordinated efforts of fifty state legislatures). This effect is compounded by copyright's statutory character, since it is not subject

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[28] *See* Part III.B, *infra*.

[29] *Cf., e.g.*, LARRY LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 229-34 (2004) (describing the legislative process leading to the passage of the Copyright Term Extension Act of 1998 as a classic example of "rent-seeking" legislation—a law designed solely to enrich a particular powerful interest group).

to the forced gradualism of common law processes.[30] And copyright's relative novelty means that it lies unmoored from the moral instincts that have accompanied the historical development of other property law, so that public backlash against even radical change is less likely.[31] As a result, the history of copyright reform has been written largely by content owners who wanted to extract more value from their works. Noah Webster successfully lobbied Congress for the first copyright term extension in 1831 (the bill for which was introduced by Webster's son-in-law, William Ellsworth).[32] The earliest version of the derivative right was established to protect Harriet Beecher Stowe's right to own translations of *Uncle Tom's Cabin*.[33] And the twenty-year extension of copyright terms in 1998 (which no member of Congress opposed) was supported by a conglomerate of major content industry players, spearheaded by Disney.[34] Indeed, all the major copyright laws passed in the past forty years have been expansions of owners' rights.[35] As copyright trends in a more expansive direction, the likelihood that unauthorized uses may be formally infringing but still socially beneficial grows ever greater.

The second reason that warrants particular concern for users' rights looks to legal precommitments governing copyright regulation

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[30] *See* Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 178 (describing the features and possible advantages of common-law minimalism).

[31] The Copyright Term Extension Act and Digital Millennium Copyright Act were both passed in 1998 with little resistance, even though they represented massive changes to the landscape of information regulation. The public slowly grew aware of the implications of both Acts, though, and responded with increased attention to future revisions to copyright law. Some expansions of copyright have taken place with little public resistance, such as the Family Entertainment and Copyright Act of 2005, while others have met with outrage, such as the Stop Online Piracy Act of 2012.

[32] The 1831 Act extended the initial term of copyright from fourteen to twenty-eight years. Thomas Nachbar, *Constructing Copyright's Mythology*, 6 The Green Bag 2d 37, 39 (2002).

[33] Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209 (1983) (describing the genesis of today's adaptation right in the nineteenth-century controversy over Stowe's unsuccessful attempt to bring an infringement lawsuit regarding an unauthorized German translation of her novel).

[34] *See* LESSIG, *supra* note 29 at 229-34.

[35] *See* JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET 35-63 (2001) (cataloguing the owner-friendly copyright expansion of the past half-century).

rather than political reasons to suspect that the extant rights overprotect works. As we have seen, copyright, in contrast to physical property, does not have as its ultimate end the production of value for owners. Rather, it is animated by the goal articulated in the Constitution's Progress Clause: to create exclusive rights in authors for limited times in order to "promote the progress of science."[36] The Supreme Court has emphasized that copyright's exclusive rights may make owners richer, but that this is simply a means to the system's ultimate end of creating a culturally rich society and a well-informed citizenry.[37] The Progress Clause is sometimes described as a mere preambular aspiration,[38] this dismissal understates the nature of its authority. The Clause describes not only a general ideal, but an enforceable, limiting principle that is part of the Constitution's establishment of a government of limited powers.[39] Congress may not create intellectual property laws unless those laws "promote the Progress of Science."[40] This legal obligation reminds us of the important proposition that strict enforcement of the copyright laws may not serve the interests of society, and indeed may not even be permissible as a matter of law, if it represents a surfeit of private rights in information at the expense of public access to cultural goods.

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[36] U.S. Const. art. I, cl. 8, sec. 8; Fox Film v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States . . . in conferring [a copyright] lie[s] in the general benefits derived by the public from the Labors of authors.").

[37] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

[38] *E.g.*, Schnapper v. Foley, 667 F.2d 102, 112 ("[W]e cannot accept appellants' argument that the introductory language of the Copyright Clause constitutes a limit on congressional power.").

[39] Eldred v. Ashcroft, 255 F.3d 849 (D.C. Cir. 2001) (Sentelle, J., dissenting) (describing the Progress Clause as an "express limitation" on congressional power). Later Supreme Court cases implicitly accepted the proposition that the Progress Clause did effect a substantive limitation on congressional power, *e.g.*, Eldred v. Ashcroft, 537 U.S. 186 (2003), Golan v. Holder, 132 S. Ct. 873 (2012), even though the Court ultimately did not invalidate legislation as beyond the boundaries prescribed by the Clause.

[40] Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.").

Copyright is a form of property, albeit a peculiar one. This distinctiveness explains the need for a notion, and a doctrine, of efficient copyright infringement. Copyright's ultimate aspiration is not to make owners richer, but to make society richer through maximizing cultural production. The sweeping generality with which law must operate means that, however much it would disappoint James Madison, exclusive rights cannot be perfectly calibrated to assure that in every instance owners' incentives match perfectly with society's best interests. Efficient copyright infringement seeks to counter this slippage, which typically (though by no means always) comes in the form of overprotection of owner's rights. Hence reaching the maximal level of cultural production requires not only a narrative about owners' copyrights and enforcing them, but also one about the circumstances under which violating those rights may be the best way to achieve the copyright system's constitutional goals.

II. EFFICIENT COPYRIGHT INFRINGEMENT'S DOMAIN

Part I justified the need for an account of efficient copyright infringement. Part II seeks to develop that account, first by discussing the notion of efficient copyright infringement in complete but parsimonious terms.[41] It first establishes a general model of what efficient copyright infringement is, using contract law's notion of efficient breach as a starting point. It then disaggregates this model into its two constituent elements—welfare-enhancing use and flawed private ordering—and constructs a taxonomy that elaborates each of these elements in more detail.

A. Efficient Copyright Infringement: General Principles

Efficient transgression is no stranger to the law. Contract, for example, has a robustly developed notion of efficient breach.[42] Its

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[41] *Cf.* Henry Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1695 ("As with scientific theories in general, a property theory should aim to explain more facts with less machinery."). Smith's description of a theory may be closer to a model. *See generally* Emanuel Derman, Models. Behaving. Badly.: Why Confusing Illusion with Reality Can Lead to Disaster, on Wall Street and in Life (2012) (distinguishing models and theories).

[42] *E.g.*, Robert Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) ("Repudiation of

logic is simple and intuitive. If A promises B something by means of a written contract, and then A finds that it would be more profitable to breach and pay damages than to fully perform the contract,[43] then breach is a better result than full performance. Such a breach puts A in a better position, and costs B nothing since expectation damages put B in the same position she would have been had A fully performed.[44]

The structure of efficient breach in contract law maps imperfectly onto the domain of copyright for several reasons. First, while common law contract remedies limit promisees to expectation damages in case of breach, copyright's remedies offer a wider array of options to owners who win infringement suits. Prevailing plaintiffs can opt for actual damages in the form of the costs of their breach or the profits earned by the infringer, whichever is greater. And where a work has been timely registered, plaintiffs can also opt for statutory damages, which entitle them to a flat-fee recovery regardless of the actual costs exacted by the infringement. Statutory damage awards lie within judicial discretion, but can range from $750 to $30,000 per infringing act, with a ceiling of $150,000 per act in cases of willful infringement.[45] Copyright's damages structure is thus designed to deter the very kind of opportunistic transgression that efficient breach

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obligations should be encouraged where the promisor is able to profit from his default after placing his promise in as good a position as he would have occupied had performance been rendered."). Efficient breach is more a "notion" than a "doctrine" because it is really an idea that has been used to explain why common law contract doctrine does not permit exemplary or punitive damages. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (propounding an efficient-breach explanation of contract law's lack of such damages).

[43] This may be the case where, for example, a supplier who has promised to deliver goods gets a significantly more lucrative offer for the same goods. *See* POSNER, *supra* note 42 (outlining such an example).

[44] Courts have typically respected instances of efficient breach by limiting defendant-promisees' remedies to expectation damages. *E.g.*, Lake River Corp. v. Carborundum Co., 769 F.2d 1284 (7th Cir. 1985). Nevertheless, efficient breach has its critics, some of whom argue that contract represents a moral obligation that should not be breached regardless of economic considerations, *e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1982), and others who argue that the efficient breach theory fails to maximize social welfare, *e.g.*, Charles Calleros, *Punitive Damages, Liquidated Damages, and Clauses Penales in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code*, 32 BROOK. J. INT'L L. 67, 87-88 (2006) (summarizing welfarist critiques of the efficient breach hypothesis).

[45] 17 U.S.C. sec. 504 (outlining actual and statutory damages remedy schemes).

encourages. An infringer who makes a $100 use of a work that was available for $10 will still be subject to an actual damages award of $90 (wiping out any profit), or statutory damages of at least $750 (making the infringement a massively value-negative proposition).

Second, efficient breach is closely tied to contract's distinctive structure, where an initial, formal agreement between a promisor and a promisee leads to an executory period in which the promisee's performance remains partial, culminating with some future moment in which performance has been completed. By contrast, copyright infringement possesses the structure of a simple property tort. The moment a user exercises without authorization one of the six exclusive rights an owner enjoys with respect to a copyrighted work of authorship, infringement has taken place, much as an act of trespass is perfected the moment a non-owner steps onto someone else's real property without permission. The structure of copyright infringement, unlike contract performance, does not rely on a gap between the execution of an agreement and its ultimate completion. It is a moment in time, not a span within which the minds of parties or external circumstances can change.

Efficient breach in contract—at least as it has been elaborated in the literature—aligns poorly with copyright also for a final reason. Contract's efficient breach models typically assume a closed universe of relevant parties (promisor and promise) and sidelines the distributed social costs of such breaches.[46] We could think about copyright infringement in these terms as well, where the costs of the unauthorized use affect only the owner and benefit only the infringer. But such a focus would too narrowly construe copyright's aims. The ultimate end of maximizing cultural production means that a dialogue about the efficiency of copyright infringement has to take into account not only the private, but also the public costs and benefits of unauthorized use to an extent that is underappreciated in contract law's efficient breach literature.

But while efficient breach may not provide a neatly applicable doctrinal framework for modeling efficient copyright infringement, it

[46] *E.g.,* Brooks, *supra* note 9; *but see* HENRY MATHER, CONTRACT LAW AND MORALITY 117-18 (1999) (discussing the harm efficient breach may cause to society's faith in the stability of contract).

is helpful insofar as it provides a similar basic principle. Some breaches of contract are efficient because they are Pareto superior to contract performance. That is, they make some parties (promisors) better off, and do so without causing any parties (even promisees) to end up worse off. Similarly, some infringements of copyright may certainly be efficient in the sense that they generate net social welfare. It's possible that a Limewire user's enjoyment of an illegally downloaded .mp3 is massive, and swamps the lost licensing revenue and associated costs of the infringement to the sound recording's owner. But this outcome is only Kaldor-Hicks efficient, because the Limewire user's gains come at the expense of the sound recording owner's (marginal) losses. And there was, of course, a Pareto superior alternative: The user could have downloaded the sound recording instead legally from iTunes, and that way everyone wins.[47] The sound recording and musical work owners get paid a royalty, and the user's massive enjoyment of the track easily makes the $1 cost of the track well worth it to them.[48]

So why do we need efficient copyright infringement in a world where good old private ordering provides the best way to facilitate welfare-enhancing uses of copyrighted works? If private ordering always worked as in the above ideal example, then efficient infringement might be unnecessary. But as a practical matter, market mechanisms may fail to enable welfare-enhancing uses. Under such circumstances, standard assignment or licensing practices are unavailable, and it becomes necessary to consider how unauthorized use can fill in these gaps in order to maximize cultural production.

The foregoing leaves us with a two-part theory of efficient copyright infringement. To restate the above somewhat more formally, legally unauthorized use of copyrighted works[49] is efficient where:

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[47] *See* Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 STAN. L. REV. 1105, 1106-07 (1982) (explaining and comparing Pareto superiority, Pareto optimality, and Kaldor-Hicks efficiency).

[48] Single iTunes tracks range from $.69 to $1.29 in the U.S. http://support.apple.com/kb/ht1711.

[49] This definition excludes the various uses listed in sections 107-122 of the Copyright Act. While these uses may not be privately authorized by owners, they are authorized by law, hence their definition as not-infringing. E.g., 17 U.S.C. sec. 107 ("fair use … is not an infringement of copyright").

(i) the sum of its social benefits is greater than the sum of its social costs, and

(ii) acquisition of permission to use the work was unavailable or untenable via traditional private ordering.

The subsequent discussion elaborates each of these elements. Before moving on to that discussion, though, I pause to say a word about the welfarist idiom of this Article. Throughout, this Article speaks about copyright ownership and infringement solely in terms of social welfare. One might reasonably point out that this is by no means the only way to think about copyright's function and purpose. Indeed, it is not: The notion of moral rights conceives of copyright from a deontic, rather than a welfarist, perspective.[50] I limit my discussion to the latter, though, for several reasons. The first is necessity: The moral issues raised by intentional unauthorized use of copyrighted works are interesting, and complex, and for that reason simply beyond the scope of what is already a rather long full-length work. Second, in the discussion that ensues in Part II.B, I hope to capture—if imperfectly—some of these concerns by considering more than just pure economic costs, but also dignitary harms, in analyzing the impacts of infringement on owners. And finally, the United States, in contrast to continental Europe and South America, explicitly adopts a welfarist approach to intellectual property. The Constitution, courts, and commentators alike tend to agree that the point of copyright is not to protect authors' rights as a deontic matter, but to maximize creative production. This Article proceeds on that assumption, though it acknowledges the interesting perspective that a non-consequentialist approach to efficient copyright infringement could bring.

B. Mapping Infringement's Costs and Benefits

This section considers the first of the two elements that constitute efficient copyright infringement: Whether an infringing act generates net benefits for social welfare. The moral instinct that

[50] For good overviews of the moral rights perspective on copyright, see ROBERTA KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (2010) and Lolly Gassaway, *Copyright and Moral Rights*, 6 INFORMATION OUTLOOK 40 (Dec. 2002).

transgression of a copyright owner's exclusive rights is wrongful tends to make us think that bad effects flow from this conduct.[51] But as the ensuing discussion shows, the real story of infringement is more complex. Unauthorized use may seem bad, but it can do good, not only for the user, but for the public and even for the owner of the infringed work. The scope of this discussion must remain modest. It is impossible to predict, ex ante, the net welfare effect of any conduct, including copyright infringement,[52] and also to measure these effects with precision ex post. The goal of this Subpart, then, is not to suggest that infringement is always, or even usually, welfare-enhancing. Instead, it seeks only to provide a detailed framework that may prove helpful in thinking carefully about how infringement affects social welfare, and in turn provides a basis for thinking about how law might use filtering mechanisms to calibrate penalties to deter socially harmful infringement and distinguish it from socially beneficial infringement.

Two dyads illuminate how unauthorized use of an owner's work of authorship may generate social welfare or social costs. First, those costs and benefits may be private or public. Private costs and benefits are those that are internalized—that is, suffered (or enjoyed) entirely by the infringer and owner themselves. By contrast, public costs and benefits are those that are externalized—that is, not experienced by the infringer or owner themselves, but rather inflicted (or conferred) on third parties. Second, the costs and benefits of unauthorized use of copyrighted works of authorship may be static or dynamic.[53] Static costs and benefits are those that lie directly in the

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[51] *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2011) (reporting the results of numerous studies showing that people who have an instinctively negative moral reaction to conduct strongly assume that the conduct will have negative social effects as well, even where there is no evidence for the latter point).

[52] These kinds of predictive empirical claims about social welfare are always to some degree indeterminate. *Cf.* Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 HARV. L. REV. 1165 (1967) (reflecting on the "inability of outside observers to appraise the efficiency of proposed social measures").

[53] This discussion borrows from the distinction between static and dynamic efficiency in the economics literature. *See*, *e.g.*, B.H. KLEIN, PRICES, WAGES, AND BUSINESS CYCLES: A DYNAMIC THEORY 46-50 (1984) (contrasting static efficiency, which is the optimal combination of inputs subject to the constraints imposed by a given production function, with dynamic efficiency, which is changing the

causal chain begun by the infringing conduct, and are not interrupted by the decisionmaking processes of third parties. By contrast, dynamic costs and benefits are more causally remote from the initial infringement, and result from the way third parties' conduct is affected by the infringement. Static costs and benefits typically include the very immediate effects of the consumption of a work, though they also include longer-term effects that directly result from it. Dynamic costs and benefits refer to the second-order systemic effects that infringing conduct causes when the infringement alter actors' incentives to engage in creative production. The static/dynamic distinction is thus not the same as the distinction between temporally proximate and distal effects of infringement, though there is a rough correlation between the two. These two dyads—private and public, static and dynamic—provide a framework for constructing a model of the welfare effects of copyright infringement.

1. Infringement's costs

Imagine that A owns a copyrighted work of authorship, and B makes an unauthorized use of it. What are the social costs of this conduct? Foremost on A's mind would likely be the infringement's static, private costs: Namely, the lost revenue for licensing fees to which she was entitled.[54] This is the very point of the copyright monopoly. The exclusive right enables owners to charge for different kinds of uses, so that unauthorized use inflicts harm on them even if it does not also deprive them of the res itself.[55] But the story of the private, static costs of B's conduct doesn't always end there. Unauthorized use of someone's work without their consent may not deprive A of property in the same sense that theft deprives an owner of their good, but it still may cause psychic harm associated with property transgression. Just as owners of real property may experience dignitary harm even in the event of an economically costless

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production function itself in profitable directions). *See also* LANDES & POSNER, *supra* note 22 at 20-21 (discussing the dynamic effects of property systems).

[54] Alternatively, B might have simply acquired the work from A outright rather than just paid for the right to make a particular use, a practice that approximates a sale of chattel goods but is known in copyright parlance as assignment.

[55] *See* LANDES & POSNER, *supra* note 22 at 13-14 (discussing how intellectual property rights enable owners to extract value by creating artificial scarcity).

trespass,[56] so may a copyright owner experience psychic costs when their work is used without consent.[57]

These static, private costs may translate, in the longer term, into dynamic, private costs. If the Bs of the world can use A's work without her permission, A will start to think that she should seek a more profitable line of work.[58] This is certainly true for authors whose primary motivation is pecuniary. But it may also be true of at least some authors who are motivated other than by money, even bloggers or amateur photographers. To the extent that unauthorized, and unattributed, use of one's creative work can effect dignitary harm, this may lead even creators without profit motivations to find the experience of creation unpleasant, and possibly to give up the game.[59] And especially where unauthorized use is made for a profit, authors or owners may either feel like they have been taken advantage of,[60] or could come to think of their work in a more pecuniary light.[61] Either of these effects could lead authors and owners to decline to produce future works in the absence of secure exclusive rights.

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[56] *Cf., e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (authorizing an award of exemplary damages for economically costless trespass as a means of compensating owners for dignitary harm).

[57] This is not to say that U.S. law protects the dignitary interests of owners, as moral rights regimes generally do. Indeed, most courts agree that it does not, *see* Gilliam v. Am. Broad. Cos, Inc., 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law … seeks to vindicate the economic, rather than the personal, rights of authors."). My assertion is merely that that owners themselves may well feel that unauthorized use affronts their dignity. *See, e.g.*, email exchange with Kirsten (on file with author) (explaining that unauthorized use of her photography on the internet is a greater concern to her from a dignitary than an economic perspective).

[58] LANDES & POSNER, *supra* note 22 at 20 ("Unless there is power to exclude, the incentive to create intellectual property in the first place may be impaired.").

[59] *See* Michelman, *supra* note 59 at 1180 (characterizing as "demoralization costs" the psychic costs of being deprived of property without compensation, as well as the losses in future production caused by the realization that future deprivations may occur).

[60] *Cf.* Tess Wilkinson-Ryan & David Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003 (reporting results of a study showing that people are highly sensitive to the suspicion that they are being exploited).

[61] *See* Dan Ariely, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 75-82 (rev. ed. 2009) (showing that market motivations tend to dominate and crowd out altruistic motivations).

Does B's unauthorized use inflict any public costs as well? This is unlikely from a static perspective. The immediate, short term costs of B's failure to pay due licensing fees—economic or personal—are internalized entirely by A. B's infringement may, though, give rise to dynamic public costs. As we have seen, B's failure to pay a license to A may well depress A's incentives to create, leading her to be at least marginally less likely to create future works. The dynamic costs of B's unauthorized use come in the form of less creative production, and a concomitantly diminished cultural milieu in the aggregate. Table 1 briefly summarizes the costs of B's infringement:

Table 1: Costs of B's infringement

	Private	Public
Static	Lost licensing revenue; dignitary harms	Alternative losses to owners of reasonable substitutes for A's work
Dynamic	Reduced incentives to create future works, for A and others	Loss of future works that A would otherwise have created but for the infringement

2. Infringement's benefits

The dominance of the standard narrative of copyright incentives makes much of the story of infringement's costs familiar. The question of how infringement might create social value rather than harm remains less explored. The ensuing discussion lays the groundwork for that exploration by mapping in detail the potential benefits—social and public, static and dynamic—of unauthorized use. Of course, most of the ensuing benefits are not unique to unauthorized use. They would accrue as readily had B paid A for a license. But understanding in detail how any use—permitted or otherwise—generates social welfare is useful for considering whether law should enable such uses when private ordering is unavailable.

The social welfare generated by B's infringement of A's work depends on the kind of use it is. Not all unauthorized uses are created equal. Some such uses have few social ripple effects, as where a Limewire user downloads a sound recording, listens to it once, and never thinks of it again. Other unauthorized uses have much greater social impacts, as where a remix DJ uses a series of unauthorized samples of sound recordings to generate an innovative new work that

brings joy to thousands of listeners and contributes to the development of music itself. Chris Sprigman has described the former category of uses as consumptive and the latter as productive,[62] and this distinction helps illuminate the social benefits that flow from different kinds of unauthorized uses. Consumptive uses refer to those where the user consumes a work solely for its informational or aesthetic value, without making any follow-on use of it that might generate additional social value.[63] Such purely consumptive uses are those we typically associate with consumer uses of works of authorship. If B's use is of this character, such as downloading an unauthorized copy of a hit music track just to listen to it, then the story of the social welfare created by the use is simple, and brief. Certainly B gets private, static benefits out of the use: Aesthetic enjoyment, free of charge, plus any illumination that may grow out of it. But the private, dynamic benefits of the use are likely few, since B's mere consumption of A's work is unlikely to change B's demand for or future consumption of creative works. And for related reasons, the public accrues few or no benefits, either static or dynamic, from B's unauthorized and purely consumptive use, in light of the fact that the very nature of such a use is that it is predominantly private act of consumption.

Consider, by contrast, the social implications that flow when B's unlicensed use of A's work is productive, not just consumptive. For example, B could use A's work to make a creative and interesting—albeit unauthorized—derivative work of her own. If this is the case, then the social welfare calculus changes substantially. The static, private benefits to B remain roughly the same. She enjoys free use of A's work as an input in her creative process. But if B's use is productive, rather than merely consumptive, then additional, distal static benefits accrue. B may enjoy fame and esteem if the work is well-received. These private static benefits may spur private dynamic ones, stimulating more demand for B's work, furthering her career, and enabling her production of future works. B may also enjoy dynamic benefits in the form of collaboration opportunities.

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[62] Chris Sprigman, *Copyright and the Rule of Reason*, 7 J. ON TELECOMM. & HIGH TECH. L. 317, 334-38 (2009) (defining and elaborating "consumptive" use).

[63] The value created by the use for its user is obviously a form of social value. My claim is not that consumptive use, even purely consumptive use, creates no social value, but that such value is almost entirely internalized by users.

The public, too, could benefit from B's unauthorized but productive use of A's work. Statically, the public can consume the resulting work itself. And this, in turn, may yield distal static benefits. B's new work may contribute to a richer cultural environment overall through the positive externalities that typically accompany creative production. B's work might spawn a cultural movement, inspire artists to do related work, or just generate interesting commentary and popular-cultural references. The fruits of such success may result in public dynamic benefits as well, stimulating social demand for works like B's and contributing to their increased production.

And counterintuitively, the dynamic (but not internalized) effects of B's unauthorized use could include benefits to A, the work's owner. Many acts of copying create downstream benefits owners may never have foreseen.[64] For example, B's productive infringement might take the form of creating a device that enables widespread infringement, but opens up wholly new secondary markets for A. The VCR enabled rampant copying, but also ended up being a cash cow for the film industry (whose lobbyists initially insisted that the VCR would sound the death knell of the film industry).[65] Or B's unauthorized use could bring new attention to and interest in A's work, especially where B's unauthorized use goes viral and brings a broader, newer audience that A's work never enjoyed before. Photojournalist Mannie Garcia threatened to sue for the unauthorized use of Garcia's Barack Obama photo in Shepard Fairey's iconic "Hope" poster. But he might have done better to send Fairey a thank-you note. Fairey's use brought Garcia's work new vistas of

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[64] *See generally* Kal Raustiala & Chris Sprigman, The Knockoff Economy (2012) (discussing the underappreciated but numerous benefits of copying to owners of copied works).

[65] Motion Picture Association of America (MPAA) President Jack Valenti famously testified to Congress that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary, 97th Cong. 8 (1982). A few years later, it became clear that Valenti had it exactly wrong. The advent of the videotape medium actually turned out to diversify and expand the market for movies and has been an enormously lucrative development for the film industry. *See* Giovanna Fessenden, *Peer-to-Peer Technology: Analysis of Contributory Infringement and Fair Use*, 42 IDEA 391, 392-93 (2002).

commercial popularity, so much so that 200 prints of Garcia's Obama photo recently sold for $1,200 apiece in a Chelsea art gallery.[66]

Table 2 summarizes the benefits of B's infringement where that infringement takes the form of a productive use:

Table 2: Benefits of B's infringement: productive use

	Private	Public
Static	Costless use of A's work as an input to create new work; riches, fame, and prestige due to use of A's work	Consumption of new work resulting from B's unauthorized use; richer cultural environment resulting from consumption and existence of B's new work; inspiration to third parties affected by B's work; "joy of piracy"
Dynamic	Increased incentives to create new works due to past success (?)	Increased demand for A's work due to new markets or complementary devices

Two points immanent in the foregoing discussion warrant further discussion. The first is the central role of productive versus consumptive use in the welfare calculus for infringement, and the asymmetry this creates with respect to infringement's costs and benefits. The capacity of unauthorized use to generate social benefits varies greatly. Some unauthorized uses, like downloading a single track via Limewire for personal consumption, bring the user value but generate no other meaningful social value. Others, like appropriating an AP photograph in order to make a political poster, can render benefits for the user, the public, and even the owner of the infringed work. By contrast, the range of costs inflicted by an infringing act is relatively small. The owner of a sound recording downloaded illegally via Limewire, and the owner of an AP photograph each experience roughly proportional losses in the form of unpaid licensing fees,[67] with commensurate dynamic and public cost implications. This asymmetry

[66] Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES, March 23, 2009, *available at* http://www.nytimes.com/2009/03/24/arts/design/24photo.html.

[67] It was not clear who owned the rights to the Obama photograph Fairey used. Garcia claimed he did, while AP argued that Garcia had contractually assigned to them all rights in the work. *See* Randy Kennedy, *Artist Sues The A.P. Over Obama Image*, N.Y. TIMES, Feb. 9, 2009, *available at* http://www.nytimes.com/2009/02/10/arts/design/10fair.html.

means that unauthorized, purely consumptive uses almost certainly do not result in efficient infringement, while productive uses well might.

Whether a particular unauthorized productive use of a work of authorship will generate net social welfare, though, is fraught with uncertainty. While some productive infringement will generate significant welfare gains, not all such uses will do so. It is impossible to know, ex ante, whether a particular unauthorized use, even if formally productive, will be the next "Hope" poster, or will wither on the vine and find any social welfare gains it creates swamped by the social costs of the infringement. This uncertainty is particularly problematic in light of the asymmetry between infringement's relatively constant costs and its relatively variant benefits. Since an owner loses the same amount regardless of the character of the unauthorized use, she will have an equal incentive to immediately quash all infringements alike. When the use at issue is purely consumptive, this is a perfectly good outcome. But when the use is productive, reflexively shutting it down could be costly for the user, the public, and even the owner herself.

Finally, it bears noting that the productive/consumptive use distinction can take us only so far. The foregoing discussion treats the distinction as a binary, but the story is more complicated. Some purely consumptive uses will generate more social value than others, even to the extent that such value is completely internalized. It creates negligible social value when a user illegally downloads movies or music tracks that they end up consuming and then forgetting about. But some consumptive uses promise greater social utility. Consider, for example, a student who acquires a digital version of an out-of-print book to read as helpful background for class discussions.[68] Moreover, uses that do not result in a new and creative derivative work may still fairly be regarded as "productive" to the extent that they generate social value. Consider, for example, the Google Books Project, which makes verbatim copies of literary works for the purpose of making them available to the public.

But while these examples expose the blurriness of the consumptive/productive use distinction, they do not undermine its

[68] Thanks to James Hicks for providing this useful example.

usefulness. Some unauthorized uses are purely consumptive and do little more than deprive owners of due royalties. Such uses are extremely unlikely to amount to efficient infringement. Other uses are highly productive, and are much more likely to amount to efficient infringement. And once correctly understood as a continuum rather than a binary, the consumptive/productive use dichotomy serves as a useful heuristic for predicting the magnitude of social value a given use is likely to generate. As uses migrate from the consumptive to the productive end of the spectrum, they become more likely to create spillover value to the public rather than just internalized value to the user.

C. Where Private Ordering Isn't: A Typology

Subpart II.B.2 mapped the costs and benefits of unauthorized use of works of authorship, but a crucial question remains: If the benefits of infringement would accrue regardless of whether the use was authorized or unauthorized, then how could infringement ever be a better option than authorized use? This Subpart outlines two such circumstances. One category is *market-endogenous*—a product of some flaw in markets for copyright license or assignment. That is, infringement may be welfare-enhancing where a productive use cannot be acquired through normal market channels because private ordering has broken down. The other category is *market-exogenous*—a product of some feature external to markets for copyright license or assignment. This Subpart uses the distinction between market-endogenous and –exogenous uses as an organizational scheme to construct a taxonomy of conditions under which efficient copyright infringement may occur.

Three qualifications about the ensuing taxonomy are in order. First, the taxonomy seeks to be thorough but not necessarily exhaustive. While it likely captures most instances where copyright infringement may be efficient, there may well be other circumstances that are not mentioned here. Second, these categories are by no means mutually exclusive. In some instances they may even be mutually reinforcing, as where the effect of a copyright owner's overvaluation of their work is to suppress a use that is central to democratic discourse. Finally, and perhaps most importantly, the categories represent only conditions under which copyright infringement *may be*

efficient. The suggestion is not that all uses that are precluded by high transaction costs, owners' overvaluation, or external concerns about the costs of licensing markets are welfare enhancing. This Subpart uses extended examples to illustrate the possibility—and in each case, also the plausibility—of efficient unauthorized use. One might, of course, tell a counter-story in each instance in which a different unauthorized use may be welfare-diminishing even in the presence of a flaw that is endogenous or exogenous to licensing markets. But this does not diminish the point of the ensuing discussion, which is only that a nontrivial number of such uses are efficient, and that this matters to copyright law.

A. Market failure: transaction costs

Markets for licensed uses of popular works of authorship often work pretty well. If the Staples Center wants to perform jock rock during Lakers and Kings games (as they invariably do), they simply need to contact ASCAP and BMI for public performance licenses for each of the respective repertories. An individual who wants to acquire an .mp3 version of a popular music track for personal use can simply pay iTunes around 99 cents to download it to their hard drive. In other instances, though, lack of smoothly functioning markets render private ordering less available or unavailable to would-be users. Consider two iterations of high transaction costs. First, it may be unclear who owns rights to the work the user seeks to license, or how to go about acquiring those rights, especially for users who are not sophisticated repeat participants in licensing transactions.[69] Related, even where owners are readily identifiable, the costs of negotiation and bargaining may be prohibitive, especially where there are numerous different licenses to negotiate in order to create a single work.

What links these quite different stories is that they are both about licensing that has been frustrated by transaction costs.[70] As Wendy Gordon explained in her foundational account, when the costs

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[69] This concern has become known as the "orphan works" problem. *See* NEIL NETANEL, COPYRIGHT'S PARADOX 200-02 (2008) (discussing orphan works).

[70] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); *cf. also* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094-95 & n.12 (1972) (analyzing property rights through the lens of transaction costs).

associated with acquiring a use license become greater than the value the user expects to internalize for the work, the user is likely to forego the use altogether.[71] In the copyright context, the threat that transaction costs will undermine a welfare-enhancing use looms particularly large for two reasons. First, many unauthorized uses are socially valuable, but not greatly so, so that the risk that the use's value will be overwhelmed by even moderate transaction costs is high. And second, many derivative works draw protected aspects from many different copyrighted works, so that they require a series of separate licensing transactions so numerous that, for a different reason, the cost of license acquisition likely overwhelm any private value the user would extract from the use.

A pair of examples illustrates the point. First, a provider of low-cost legal services posts on his professional website, verbatim and without permission, an article written and copyrighted by someone else. The article provides information about various novel legal strategies that have been used to resist foreclosure, but lists no contact information for the author and does not bear a copyright notice. As a result of the posting, about fifteen people read the article who would not have otherwise, and some are distressed homeowners who contact the legal services provider for help with their underwater mortgages. Second, a DJ makes a mashup song that consists entirely of samples—twenty-five in total.[72] The DJ does not seek licenses for any of the samples. The DJ makes .mp3 versions of the resulting track online on an optional donation basis.[73] The track earns esteem among

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[71] Wendy Gordon, *Fair Use as Market Failure*, 82 COLUM. L. REV. 1600 (1982) ("When the transaction costs outweigh the net benefits that the parties would otherwise anticipate from a transfer, then the presence of the transaction costs may block an otherwise desirable shift in resource use.").

[72] This number of samples is high, but not unusually so. Most hip hop tracks contain only ten or so samples, though they are often frequently repeated throughout the track. Some artists, however, construct tracks entirely from samples that may be much greater in number. The DJ Girl Talk, for example, used 322 samples to comprise his album "Feed the Animals" and 373 samples to comprise his album "All Day."

[73] Musicians of various levels of popularity have made their albums available on a donation basis. Some popular groups, like Radiohead and Nine Inch Nails, have earned millions in voluntary donations, though less well-known indie artists have not had similar pecuniary success. *See* "NiN's Donation Model Doesn't Work for Most Artists," TorrentFreak.com, Oct. 25, 2008, *available at* http://torrentfreak.com/nins-donation-model-doesnt-work-for-most-artists-081025/.

underground music aficionados, and it earns the DJ about enough money to cover his costs of production.

In theory, each of these users could have acquired a license for the uses of the respective works of authorship in each example. In practice, though, both of the examples illustrate how license acquisition can generate prohibitive transaction costs. The provider's story is one about the iteration of transaction costs commonly called search, or information, costs. The article he posted on the website bore no information about the ownership status of the work, requiring a costly search even to find out who holds the copyright in the work, let alone engage in bargaining for use rights to it. Especially because the provider's use of the article was of relatively low value, rather than central or essential to his project, the onerous search costs associated with ascertaining a traditional use license would likely have been more trouble than the license would have been worth. The DJ presents a slightly different transaction cost story, one that is more about bargaining costs occasioned by a numerosity of owners rather than identification of rights owners themselves. Even if the ownership status of each of the sampled works is relatively clear, the time and trouble required to negotiate twenty-five separate use licenses would be massive. If the remix were thought to be a potential blockbuster and were bankrolled by a major record label, rights acquisition might be worth the trouble, but the DJ's relatively low profit expectations for the track mean that the costs of license acquisition would probably overwhelm any value he might hope to extract from the resulting song.

These hypothetical examples have many real world analogues. It may seem surprising that copyright owners would spend time and money litigating small-scale infringements. And usually, low-value infringing personal uses, such as photocopying, backing up your hard drive, or posting an unauthorized image on a blog, don't result in litigation. But there are conspicuous exceptions that should make any user of copyrighted works concerned. Owners of literary work copyrights have sued users for making copyrights, and courts have agreed that even private photocopying amounts to infringement.[74] The Recording Industry Association of America (RIAA) brought suit against a man who copied his CD collection to his personal computer

[74] American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995); *see also* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (1997).

for storage (but not filesharing) purposes.[75] Even private rebroadcasting using devices like Slingbox may amount to infringement,[76] and content owners have aggressively pursued cable companies for making unauthorized copies in the course of providing DVR services for their customers.[77] And the ease with which users can publicly use copyrighted content on blogs or social media platforms like Facebook or Pinterest enable countless formal violations of copyright for re-posting unauthorized images and text.[78] Some companies have even developed an infringement-based business model premised on identifying low-level (and often inadvertent) infringements and then pressuring unwitting users for settlement fees backed by credible threats of suit. Righthaven, for example, is a recently formed company that has sought to make a business out of acquiring the litigation rights in news articles and photos and then suing bloggers for their unauthorized use.[79] Righthaven's attempts to enforce assignments of rights to sue have thus far been stymied by courts,[80] but litigation remains ongoing and Righthaven is aggressively seeking to enforce these assignments.[81] But others, like Getty and MasterFile, have had consistent success threatening with litigation,

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[75] Marc Fisher, "Download Uproar: Record Industry Goes After Personal Use," Washington Post, Dec. 30, 2007 (describing pending litigation against Jeffrey Howell).

[76] *See* Litman, *supra* note 10 at 1900-01.

[77] *E.g.*, Cartoon Network, LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) (avoiding a finding of infringement for a remote storage DVR only on the theory that temporary buffering did not last long enough to constitute a fixation)

[78] "Will Pinterest fall into Napster's legal trap?", TheWeek.com, March 16, 2012, *available at* http://theweek.com/article/index/225677/will-pinterest-fall-into-napsters-legal-trap.

[79] Steve Green, *Righthaven extends copyright lawsuit campaign to individual Web posters*, LAS VEGAS SUN, Aug. 5, 2012, *available at* http://www.lasvegassun.com/news/2011/jan/12/righthaven-extends-copyright-lawsuit-campaign-indi/. Righthaven has recently developed a different strategy, acquiring from copyright owners not just a bare right to sue, but an assignment of the copyright, with a subsequent nonexclusive license back to the initial owner for all of the use rights in the work. The enforceability of such arrangements awaits final judicial determination.

[80] Righthaven, LLC v. Hoehn, 792 F. Supp. 2d 1138 (D. Nev. 2011) (dismissing Righthaven's infringement suit against user on jurisdictional and fair use grounds).

[81] *Righthaven v. Hoehn* was argued before the Ninth Circuit on February 5, 2013 and awaits an opinion at the time of publication.

and actually suing, users who make even trivial or inadvertent online uses of their works.[82]

Relatedly, low-budget works that involve high numbers of samples invariably face substantial clearance costs, even where the expected value of the user's resulting work is high.[83] Some artists, like the DJ Girl Talk, have avoided infringement suits. Others have not been so fortunate. The Beastie Boys were sued for infringement—on the eve of Adam "MCA" Yauch's death—that allegedly occurred on remixed tracks first released during the 1980s.[84] The challenge for remix culture is made even greater by the hard line taken by federal courts, whose position is that even a seconds-long sample of a sound recording is infringing.[85] Documentary filmmakers, whose works typically feature a pastiche of different visual clips that are likely copyright protected, find themselves in a similar clearance conundrum. To take just one example, *Z Channel: A Magnificent Obsession* documents a cable channel catering to Los Angeles' cinephile culture, and required clearance of 53 film clips.[86] Moreover, those clips each had to be separately re-cleared when the film was released in different media (theater, then cable, then DVD) and in different geographical

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[82] *E.g.*, Masterfile Corp. v. Gale, 2011 WL 4702862 (D. Utah. 2011) (granting summary judgment to MasterFile against a company that purchased and displayed online a presentation featuring unauthorized images). MasterFile and Getty's relative success compared to Righthaven lies in their very different relationship with the owners of the works they acquire. Getty and MasterFile acquire rights to the works they administer, and engage in licensing of those works. Filing suit for unauthorized use is merely part of Getty and MasterFile's purpose. By contrast, Righthaven exists purely for the purpose of suing, and scaring into settlement, as many unauthorized users as possible. *See* David Kravets, Defunct Copyright Troll Seeks Resurrection, Wired.com, July 3, 2012, *available at* http://www.wired.com/threatlevel/2012/07/righthaven-second-life/.

[83] By contrast, higher budget works that entail fewer samples simply access the emergent market for sample licenses, which avoids any transaction costs problems.

[84] Marc Hogan, Beastie Boys Hit With Sampling Lawsuit on Eve of MCA's Death, May 8, 2012, Spin.com, *available at* http://www.spin.com/articles/beastie-boys-hit-sampling-lawsuit-eve-mcas-death

[85] The Sixth Circuit's famously terse approach to the issue epitomizes this approach. "Get a license," it stated in holding that a four-second clip infringed the plaintiff's sound recording, "or do not sample." Bridgeport Music, Inc. v. Dimension Films, Inc., 410 F.3d 792, 801 (6th Cir. 2005).

[86] *See* Paul Cullum, *Freedom of Information: Copyright and its Discontents*, L.A. WEEKLY, Aug. 17, 2006, *available at* http://www.laweekly.com/2006-08-17/film-tv/freedom-of-information.

regions. The film was released despite the exhausting transaction costs associated with it, but took a toll on the likelihood of similar films being created in the future. Producer Evan Shapiro vowed never to make a clip-intensive documentary again.[87]

Use licensing precluded by prohibitive costs represents the first iteration of market-endogenous conditions under which copyright infringement may be efficient. Private ordering may be frustrated either where the search costs of finding the copyright owner, or the iterated costs of separate rights-clearance negotiations, are prohibitively high. Where either of these conditions obtains, copyright infringement will be efficient where it is welfare-enhancing. The net social impact of any given use will always be to an extent indeterminate, but as the foregoing examples illustrate, there are numerous productive (as opposed to merely consumptive) uses that might be precluded by transaction costs concerns. This represents a serious concern given copyright's goals of encouraging optimal creative production, and it is a problem I return to in Part III.

B. Market absence: public/private asymmetries and cognitive biases

This Subpart discusses a second market-endogenous circumstance under which copyright infringement will be efficient.[88] Efficient infringement occurs also when a licensing transaction for a

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[87] Elaine Dutka, *No Free Samples for Documentaries: Seeking Film Clips With the Fair-Use Doctrine*, N.Y. TIMES, May 28, 2006, *available at* http://www.nytimes.com/2006/05/28/movies/28dutk.html. Other documentarians have observed that the costs—including transaction costs—of licensing clips have made producing certain kinds of films "almost impossible." Kimberly Brown, *Copyright vs. Creativity*, REALSCREEN, June 1, 2005, *available at* http://www.realscreen.com/articles/magazine/20050601/copyright.html?word=Copyright&word=vs.&word=Creativity. *See also generally* PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 11 (2001), *available at* http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf (cataloguing difficulties of rights clearance for documentarians making works with numerous clips).

[88] *See* Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been* Part *of the Story*, 50 J. Copyright Soc'y U.S.A. 149, 182-87 (2003) (explaining that market failure in copyright can be caused by more than transaction costs).

welfare-enhancing use fails to take place because the owner refuses to deal even when faced with a reasonable offer. There are two scenarios under which such refusals to deal may occur. First, owners may decline to license a use because the owners want to suppress the content of the copyrighted work itself. And second, owners may reject a reasonable licensing opportunity because they are subject to systematic cognitive biases that cause them to overvalue access to the work and decline even reasonable offers for socially beneficial uses.

Again, a pair of extended examples illustrates how each scenario may unfold. First, suppose that an ex-member of a relatively new religious organization has learned that the religion is actually a dangerously fraudulent cult. The ex-member posts reproductions of some of the church's materials on his personal website to reveal the church's inner workings to the public. The ex-member offers to pay a reasonable fee to post the works, but the religion refuses. Instead, the religion sues to enjoin the publication of their works, even though the works are economically valueless, in order to maintain total secrecy. Next, consider a major motion picture studio that owns the copyright to a recent blockbuster film. When a local artist wants to create and sell posters featuring fanciful "emo" versions of the main characters in the film,[89] though, the studio orders the artist to cease and desist, without offering him the opportunity to bargain for a license. The artist also offers to pay a reasonable fee for a use license, but the studio refuses. The studio cites concerns about wanting to maintain total control over its brand as well as the relatively low value that such a licensing deal would bring in, especially compared to the lucrative deals with foreign distributors and major toy companies into which it typically enters into.

In each of these examples, the willingness of the user to acquire a license to use the respective copyrighted works is moot, because the owner simply refused to deal. But why, one might reasonably ask, is this bad? Isn't this simply a necessary incident of a property owner's right to exclude as well as an instance of presumptively beneficial private ordering?[90] As a matter of law the

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[89] This hypothetical example may seem strange, but it is based on an actual case. *See infra* at pp. 34-35.

[90] *See* Raymond T. Nimmer, *Copyright First Sale and the Over-Riding Role of Contract*, 51 SANTA CLARA L. REV. 1311 (2011) (arguing that copyright merely sets

copyright owner in each of these cases is, of course, entitled to decline to license (or, as the case may be, sue the user for infringement). But as we have seen, copyright does not seek only to facilitate private ordering, but to do so in a way that maximizes cultural production. And there are reasons in each of these cases to suspect that the licensing denials, while formally permissible, may undermine rather than further the constitutional aspirations of the copyright system.

The first concern derives from the incommensurability of the value sought to be preserved by the owner in each case.[91] Certain amenities transcend monetary valuation. This is a familiar point in daily discourse, as where people say that "you can't put a price on" certain values like certain beloved objects like a family heirloom.[92] Here, what the religion seeks to achieve by enjoining its ex-member's unauthorized use is secrecy—continued suppression of its (apparently fraudulent) inner workings from the public eye. The value of secrecy is abstract and classically incommensurable because it is not reducible to some monetary amount, and thus cannot be compared along the same metric as a traditional use license that seeks only to measure the economic value of the use to a licensee.[93] It is also unmoored from standard market measures, like the reasonable value that a user might attach to it.[94] The religion did not produce the good with a profit motive in mind, unlike standard literary works that are meant to be published, sold, and read. Just the contrary: Its texts were meant to remain private and unseen save for the eyes of insiders. And while this incommensurability explanation for why market processes break down

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up background rules that are subject to change by, and indeed meant to facilitate, private ordering).

[91] *See* Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) ("Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.").

[92] This idea emerges in substantive due process law as well, where certain state practices are regarded as so offensive to a notion of decency that they are banned regardless of whatever value they might serve. Rochin v. California, 342 U.S. 165, 172-73 (1952) (holding that police may not force a witness to undergo an operation to remove a bullet even when it represented crucial evidence in a criminal case).

[93] *See* Sunstein, *supra* note 91 at 799-801 (characterizing as incommensurable the difficulty of comparing two goods or values that must be measured along different metrics).

[94] *See* Gordon, *Excuse and Justification*, *supra* note 86 at 186-88 (discussing the pricelessness in copyright).

is most apt in the example of the dubious religion, it applies to the film studio as well. The studio's refusal to deal with the emo artist was driven at least in part by a suppressive motive, though its goal was not to conceal a fraud, but to limit use of its work due to concerns about brand dilution.[95]

Skepticism about whether these refusals to deal represent healthy market function is further supported by a separate but related reason: Systematic bias on the part of each owner. While copyright's standard account of creative production is premised on the vision of rational welfare-maximizing actors, research increasingly shows that humans are in fact boundedly rational.[96] Numerous studies have shown that owners tend to overvalue goods they possess,[97] including intangible goods like copyrights in works of authorship.[98] Such overvaluation can cause owners, like the religion and film studio in these examples, to guard their works too jealously, resulting in an outsized fear on exposure of their secrets to the public or possible dilution of their brand. A variety of other cognitive biases may cause owners—especially corporate owners of highly valuable works—to fail to fully realize the value of their works. Owners may be averse to risks poses by edgier new uses, precluded by bureaucratic sclerosis from authorizing such uses, or simply indifferent to or too unimaginative to appreciate the potential of such uses.[99] Deferring to

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[95] This goal is obviously not as problematic as the religion's information-suppressive motivation, but it still raises concerns since copyright is not intended to avert brand dilution or consumer confusion. Copyright's telos is to reward creative production in the interest of enriching society. Preserving brand integrity is the domain of trademark, and can (and should) be enforced using trademark law.

[96] The cornerstone account of behavioralism and the law is Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

[97] *See* Daniel Kahneman et al., Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, 5 J. Econ. Persp. 193, 194-97 (1991) (describing the endowment effect); Christopher Buccafusco & Chris Sprigman, *Valuing Intellectual Property: An Experiment*, 96 Cornell L. Rev. 1 (2010) ("[A] mountain of survey and experimental data have shown that people attach substantially higher value to goods they own as compared to goods they are considering purchasing.").

[98] Buccafusco & Sprigman, *supra* note 97 at 25 (summarizing results of a study showing that authors of works tend to value their works more highly than those who are seeking to buy them).

[99] *See* Gordon, *Excuse and Justification*, *supra* note 88 at 182 (observing that licensors may pass up good deals due to causes including "personal risk aversion, bureaucratic structure, group dynamics, and laziness").

refusals to deal may thus represent not sound market function, but instead the reification of systematic and counterproductive overvaluation. And even if these refusals to deal are rational with respect to the owner (say, because they value suppression more than any available license fee), they could still exact net social costs to the extent that the public loses access to crucial information or edgy lower-value works.

Of course, any denial of licensing could possibly be the result of the owner's overvaluation of access to the work rather than an objective decision that the license fee offered was too low. Hence here, I discuss in detail one circumstance—illustrated by the second example above—where bias is especially likely to frustrate productive uses of works of authorship. Where there is a large, well-capitalized owner (like the film studio from our example) and a range of differently wealthy licensees (from major toy companies to the startup emo artist), the likelihood is especially strong that small-scale users will be priced out of the market because the owner will set license prices by the much greater amounts affordable to wealthier licensees.[100] This effect is exacerbated by a related cognitive bias whereby regarding a good primarily as a market commodity tends to crowd out other motives for engaging in exchange with respect to that good, such as altruism.[101] Now that content owners have realized that licensing can be like "sitting on a goldmine" for them (either as a result of exorbitant license fees or big infringement settlements and judgments),[102] they are less likely to recognize the public-regarding

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[100] In a classic illustration of the point, filmmaker Jon Else sought to clear the rights to a 4.5-second clip of *The Simpsons* that was visible in the background of a scene in his documentary. Fox demanded a $10,000 fee for the license—ostensibly an "educational rate", but in absolute terms more similar to what other major content industries typically pay (and far beyond the means of a documentarian). *See* LESSIG, FREE CULTURE, *supra* note 29 at 95-97 (discussing the Else case); *see also* AUFDERHEIDE & JASZI, *supra* note 87 at (describing a dynamic by which content industries have ceased to engage in individualized bargaining with smaller licensees for film rights, instead demanding prices approaching those affordable only to other major creative owners and producers).

[101] *See* ARIELY, *supra* note 61 at 75-82 (comparing market norms and social norms).

[102] *See* MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, *Will Fair Use Survive? Free Expression in the Age of Copyright Control* 6 (2005), *available at* http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf (quoting a media liability insurance broker).

value of permitting playful, basically harmless variations, "emo" or otherwise, to emerge, and instead regard them as merely an unauthorized financial threat to be quashed.

And as was the case in the preceding subpart, the hypothetical examples used to illustrate this point are all drawn from real cases. The initial example involving a religion seeking to use copyright to suppress internal materials was modeled on several infringement lawsuits brought by the Church of Scientology, which has used copyright as an offensive tool to stop ex-members from posting its writings online in the context of critical discussions.[103] Literary work owners and their heirs have also used copyright to stop the release of historically relevant writings[104] and, in some cases, even to suppress the use of quotations in academic work.[105] Content industries have denied documentarians licenses to use their clips due to fear of political backlash, as where CBS refused to license a clip of George W. Bush to the makers of the film *Uncovered: The Whole Truth about the Iraq War*—despite an offer of full compensation—because the studio did not want to be perceived as criticizing the President.[106] And some copyrights are used suppressively out of what appears to be plain old spite. The owner of the copyright in the Baltimore Ravens' original logo, for example, apparently feels robbed of due recognition by the team. As a result, he continues to aggressively pursue copyright infringement suits against incidental uses of the logo in Ravens

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[103] E.g., Religious Technology Ctr. v. Lerma, 897 F. Supp. 260 (E.D. Va. 1995); Religious Tech. Ctr. v. F.A.C.T.Net, Inc., 901 F. Supp. 1519 (D. Colo. 1995); Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc., 923 F. Supp. 1231 (N.D. Cal. 1995). The First Circuit also recently upheld a district court finding of liability against an Orthodox archbishop for posting on his website translations of religious works that he had helped create but did not own. Society of the Holy Transfiguration Monastery v. Gregory, __ F.3d __ (No. 11-1262) (1st Cir. Aug. 2, 2012).

[104] *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).

[105] *See* Gordon Bowker, "An End to Bad Heir Days," The Independent, Jan. 6, 2012, *available at* http://www.independent.co.uk/arts-entertainment/books/features/an-end-to-bad-heir-days-the-posthumous-power-of-the-literary-estate-6285277.html (describing the efforts of James Joyce's literary heir to use copyright as a means of suppressing any public use or textual quotation of Joyce's works, contributing to "the long absence of a comprehensive [biography] of the author").

[106] Lawrence Lessig, *Copyrighting the President*, WIRED MAG., Aug. 2004, *available at* http://www.wired.com/wired.archive/12.08/view.html?pg=5.

historical films and photos[107]—though since his work was not registered, Bouchat's total money damages against the Ravens have to date totaled a mere $721.65.[108]

The second example in this subpart is also modeled on a real-world example: JSalvador's "Super Emo Friends."[109] JSalvador's work featured "emo" variations of various superheroes, and was sold on Etsy.com for very low prices. After achieving some underground notoriety for his work, the artist heard from Marvel, but not with an offer to arrange a mutually beneficial licensing deal, but rather a cease-and-desist notice demanding removal of all work using Marvel's character copyrights. JSalvador complied with the notice, and then sought to negotiate reasonably (but modestly) priced licenses for his uses from the relevant copyright owners, but received the consistent response that there was no interest in granting use permission under any circumstances.[110]

Overvaluation bias can lead to holdup problems even when the owner's work is merely an incidental part of the use. The song "Happy Birthday" remains copyrighted until at least 2030, and its owners have taken advantage of the work's ubiquity to demand "brutal" licensing fees whenever it is sung in a film scene.[111] For lower budget films, these licensing fees can prove prohibitive, causing filmmakers to

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[107] Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301 (4th Cir. 2010) (holding that use of original Baltimore Ravens logo in historical films about the team was not a fair use); *see also* Lorraine Mirabella, "Logo artist files copyright lawsuits against Ravens, NFL," *available at* http://articles.baltimoresun.com/2012-07-02/business/bs-bz-ravens-logo-lawsuit-20120702_1_ravens-and-nfl-frederick-e-bouchat-new-logo (reporting on a recently filed suit by the original Ravens logo owner for displays of the logo in photos at the team's stadium).

[108] Bouchat v. Baltimore Ravens Ltd. P'ship, 2012 WL 6738321 (D. Md. Dec. 27, 2012) (slip op.).

[109] http://superemofriends.com/

[110] See emails from JSalvador, on file with author.

[111] If this example makes you wonder whether you're committing copyright infringement whenever you sing "Happy Birthday" to a friend in a restaurant, it should—and you probably are. *See* 17 U.S.C. sec. 106(4) (securing an exclusive right of public performance in owners of copyrighted works, including musical works); *id.* sec. 101 (defining "public" to include any place open to the public). Hence most films with birthday-singing scenes feature the public domain work "For He's a Jolly Good Fellow" instead of "Happy Birthday" to avoid exorbitant licensing fees.

consider scrapping even crucial scenes because they cannot afford to license "Happy Birthday."[112] Even an incidental, but copyrighted, occurrence like a ring tone going off[113] or a TV clip flickering in the background of a room[114] can lead to licensing fees in the five figures—affordable to a major film producer but not to a less wealthy one.

Where copyright owners' refusals to deal are subject to systematic overvaluation biases, and/or where they are inspired by information- or expression-suppressive motivations, infringements that create net social welfare may well be efficient. As with the previous discussion, though, the question whether a given use will enhance social welfare is so difficult as to be insoluble. But the preceding examples and cases point in the direction of some general principles that can help illuminate when infringement is most likely to be efficient. First, as the grids from Part II.B illustrated, a public/private asymmetry accompanies all copyright enforcement and consumption. Enforcement is delegated to owners, who internalize all the benefits of a license or an infringement judgment. But the costs of excessive or unreasonable enforcement—the lost benefits of the foregone use—will be borne largely by the public. Owners thus have no incentive to govern their works in a way that attends to the public benefits copyright use can generate.[115] So when a use is productive, and owners' enforcement motivations seem infected by suppressive intention or systematic bias, the likelihood that infringement will enhance aggregate social welfare is particularly high.

C. Market costs: anti-commodification and the copyright/free speech tension

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[112] AUFDERHEIDE & JASZI, *supra* note 87 at 11 (describing the problems posed by exorbitant licensing fees to feature "Happy Birthday" in a pivotal scene in the documentary "Hoop Dreams").

[113] Nancy Ramsey, *The Hidden Cost of Documentaries*, N.Y. TIMES, Oct. 16, 2005, at A13.

[114] LESSIG, FREE CULTURE, *supra* note 29 at 95-97 (discussing the Jon Else case).

[115] This is copyright's iteration of the public choice problem, where concentrated interest groups tend to win out in political processes over distributed ones even when the latter's concerns are more compelling.

The previous two Subparts discussed two ways that private ordering might fail to enable licensing of socially productive uses of copyrighted works, raising the possibility of efficient copyright infringement. While different, each of the reasons that private ordering failed discussed above were market-endogenous. They were related to concerns flowing from either transaction costs or concerns about an owner's socially costly refusal to deal. This Subpart considers market-exogenous concerns about private ordering instead. These are reasons to think that subjecting certain kinds of uses of copyrighted works to market forces may itself exact costs so high that unauthorized use may be preferable. Two variations are offered. In one scenario, the very fact of licensing tends to undermine the impact of the work. In the other, the use is so closely tied to a constitutional or statutory right that requiring licensing for the use complicates—if not outright violates—the state's guarantee of that right.

Again, consider two illustrative examples. First, imagine that an appropriation artist[116] creates a visual collage that combines several copyrighted magazine photographs. The photographs are all available for reasonable licensing fees, but the artist uses them without with permission, since the unauthorized character of the taking is key to his status as a rebellious outsider figure. The collage satirizes a different, rival artist, without sending any particular message about the photographs that comprise the collage. Second, suppose that a political lobbying group supports a particular candidate, and reprints verbatim substantial parts of his recently published biography on their website in order to illustrate aspects of his life history and personal philosophy they support. The lobby chose to use the verbatim excerpts because they felt that the biography itself best captured the candidate's appeal, and was more persuasive since it used his own words. The lobby could have contacted the biography's publisher for a license to reprint the sections, but simply chose not to.

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[116] Contemporary appropriation artists make works that are composed of preexisting art, assembling them to create new—albeit derivative—works. Jeff Koons is likely the most popularly recognizable appropriation artist, while Thierry Guetta earned recent fame thanks to his being featured in the film *Exit Through the Gift Shop*. For a very brief overview of the genre, see http://arthistory.about.com/od/glossary_a/a/a_appropriation.htm.

In contrast to the examples discussed in the preceding subparts, these examples assume that licensing markets are functioning perfectly well. The owners would be willing to sell a license, and the users could afford one. In each case, then, an argument that licensing is unavailable must be exogenous—that is, outside or a product of—market function itself. In the artist's case, the concern is that subjecting the use to a licensing scheme invariably weakens the effectiveness of the use. This is because seeking permission would have undermined an important aspect of the collage's message. The artist's method is unauthorized appropriation, and this depends on his art being transgressive and illicit.[117] To seek permission and defer to legal norms would risk neutering the countercultural power of the artist's work.[118] The concern is a variation on anticommodification: The argument of Margaret Radin and others that rendering some behavior or goods subject to market forces exacts social costs that overwhelm any benefits created by exchange in those goods.[119] For example, resistance to markets in babies or organs derives from a sense that such markets would corrode our sense that human life is sacred, or that bodily integrity is sacrosanct.[120] So too, here, requiring a street artist to participate in traditional licensing markets in order to acquire rights as a precondition to creation would exact harm on the resulting work itself, by converting outsider art into insider art.

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[117] Much, though not all, appropriation features transgression as a major theme, and depends on unauthorized use to communicate this message. Shelley Walker observed that "Stealing may be a cooler, more street term for appropriation." Barbara Pollack, *Copy Rights*, ARTNews, March 22, 2012, *available at* http://www.artnews.com/2012/03/22/copy-rights/. And Richard Prince boasted that "I didn't exactly 'fall' [into photography] as much as steal." Laura Gilbert, *No longer appropriate?*, The Art Newspaper, May 2012, *available at* http://www.theartnewspaper.com/articles/No-longer-appropriate/26378.

[118] Nor is it the only instance where paying for something changes the experience entirely. This is the primary distinction between prostitution and consensual sex.

[119] Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1871-87 (1987).

[120] *Cf. id.* at 1885 ("Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable 'objects.' This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics.").

Requiring permission would raise different market-exogenous concerns in the lobby's case. The lobby could have merely negotiated a license with the publisher to reprint part of the politician's biography, so its conduct initially appears to be a straightforward act of infringement. But featuring the excerpts on their website, even if infringing, was also an act of core political expression—announcing and articulating their support for a candidate for public office. Requiring that such expression be subject to licensing raises serious questions about tension between copyright and First Amendment rights to engage in political speech. In many settings, law reflexively rejects the notion that a right remains meaningful when it is subject to a price. The Sixth Amendment right to counsel, for example, is not satisfied by the mere existence of costly lawyers that a criminal defendant could hire for a sufficient retainer fee. Instead, the Supreme Court has held that the right to counsel requires provision of counsel to all defendants, including for free to indigents.[121]

The nexus between copyright and the First Amendment and copyright is obviously more complex, and certainly the rule cannot be that any time a U.S. citizen wants to engage in self-expression, copyright takes a back seat. But the possibility that of copyright may threaten speech interests is well established.[122] One of copyright's goals is to sustain a democratic civil society,[123] and yet the Copyright Act enables state agents enforcing infringement judgments to use force for the purpose of suppressing its citizens' expression—even going so

[121] Gideon v. Wainwright, 372 U.S. 335 (1963).

[122] A litany of cases in the past decade has entertained Speech Clause challenges to copyright laws or their enforcement. While courts have taken seriously the premise that copyright and the Speech Clause lie in tension with one another, most of these constitutional challenges have failed. *E.g.*, Golan v. Holder, 132 S. Ct. 873 (2012) (rejecting a Speech Clause challenge to copyright restoration provisions of Uruguay Round Agreements Act); Eldred v. Ashcroft, 537 U.S. 186 (2003) (invalidating a Speech Clause challenge to the Copyright Term Extension Act); Universal City Studios, Inc. v. Corley, 273 F.3d 429, 435 (2d Cir. 2001) (rejecting a Speech Clause challenge to an injunction issued under the Digital Millennium Copyright Act). For a conspicuous exception, see Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir. 2001) (invalidating, on a Speech Clause theory, an injunction against publication of a parody of *Gone With the Wind*).

[123] *See generally* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

far as seizing and destroying copies of infringing works.[124] Speech concerns are particularly salient in the copyright context because requiring paid permission to use a copyrighted work for the purpose of self-expression approximates the kind of speech-licensing requirement that garners particularly strong First Amendment skepticism.[125] So where, as here, a substantial free speech interest is threatened by copyright enforcement, there is at least a plausible argument that the enforcement may raise significant rights-based concerns.[126]

These hypothetical examples find analogues in numerous actual controversies and litigated cases. As iconic examples like Andy Warhol and Barbara Kruger illustrate, much modern visual art takes as its theme rebellion and resistance, and as its method appropriation.[127] The concern that permitted use will undermine the message sent by the work itself applies to a significant proportion of contemporary art, especially as creative production increasingly involves and depends on (often unkind) references to previous work.[128] The ensuing tension

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[124] 17 U.S.C. sec. 503(a) (authorizing judges to order seizure of infringing copies and the means by which they were produced). *See* Cariou v. Prince, 784 F. Supp. 2d 337, 355-56 (S.D.N.Y. 2011) (ordering that appropriation artist (and his gallery) found liable for copyright infringement "deliver up for impounding, destruction, or other disposition, as Plaintiff determines, all infringing copies of the photographs, including paintings and unsold copies of the Canal Zone book, … and all transparencies, plates, masters, tapes, film, negatives, disks, and other articles for making such infringing copies").

[125] *See* Philip Hamburger, *Getting Permission*, 101 NW. U.L. REV. 405, 410 ("Nothing was more severely forbidden by the First Amendment's guarantee of speech and the press than licensing--the requirement that one get permission before speaking or using the press—and this proscription was fortunate.").

[126] *Cf.* Neil Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (developing a doctrinal framework for subjecting copyright to Speech Clause scrutiny).

[127] As artist Mike Bidlo colorfully put it, "Appropriation art brings masterpieces to a whole new generation. New generations need new blood to live. Yes, they need fresh blood continually. If we have to do that by standing on the shoulders of giants and penetrating their necks like vampires, then that's the spice of life." *See* Pollack, note 117 *supra* (quoting Bidlo).

[128] *See id.* ("Appropriation art is a well-recognized modern and postmodern art form that has challenged the way people think about art, challenged the way people think about objects, images, sounds, culture.") (quoting copyright attorney Josh Schiller). This tradition of critical copying ranges much more broadly than just modern appropriation art, having roots that go back at least as far as Marcel Duchamp. *See* Donald Kuspit, *Spiritualism and Nihilism: The Second Decade*, ArtNet.com, *available at* http://www.artnet.com/magazineus/features/kuspit/kuspit3-

between modern art and copyright ownership continues to produce litigation, and courts have tended to favor owners in these disputes. Contemporary artist Jeff Koons has been involved in five separate lawsuits, winning the most recent,[129] but losing or settling the previous four.[130] Shepard Fairey's work takes disobedience and resistance as one of its major themes, and is hence unapologetically appropriative. The infringement lawsuit brought by the AP against Fairey for his unauthorized use of a news photo as the basis for the iconic "Hope" poster of Barack Obama led to undisclosed settlement.[131] And most recently, artist Richard Prince (and the gallery that featured his work, the Gagosian, which was named as co-defendant) lost an infringement lawsuit, and suffered a heavy adverse judgment, for the unauthorized use of Patrick Cariou's photographs in Prince's "Yes, Rasta" series.[132] And beyond the modern art context, one can readily imagine unauthorized, verbatim uses of copyrighted works whose efficacy would depend on their unauthorized character. If Julian Assange's

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17-06.asp (cataloguing the contemporary relevance and historical importance of Duchamp's appropriative art).

[129] Blanch v. Koons, 246 F.3d 152 (2d Cir. 2005) (holding that Koons' unauthorized use of a photographer's work in a collage was fair use because it parodied the owner's work).

[130] Rogers v. Koons, 960 F.2d 301 (2d Cir 1992) (holding that Koons' unauthorized use of a photographer's work in a sculpture was not fair use, but merely appropriation). *See also* Gilbert, *supra* note 117 (reporting that Koons' has four losses or settlements versus his one win in copyright infringement suits).

[131] Randy Kennedy, *Shepard Fairey and the AP Settle Legal Dispute*, N.Y. TIMES, Jan. 12, 2011, *available at* http://www.nytimes.com/2011/01/13/arts/design/13fairey.html. Fairey's work is unapologetically appropriative, which has led some artists to criticize him as a plagiarist. Their objection is less about potential lost licensing revenue than a sense of disrespect occasioned by Fairey's failure to attribute. *See* Dan Wasserman, How Phony Is Shepard Fairey? The Boston Globe, Feb 2, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/outofline/2009/02/how_phony_is_shepard_fairey.html (cataloguing complaints from artists used by Fairey and others about lack of appropriate attribution).

[132] Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2010). The Second Circuit heard an appeal of the district court's judgment for Cariou earlier this year. The appellate decision has not yet been issued. In oral argument, though, the court compared the district court's remedial order—which required Prince to destroy all existing copies of his works that made unauthorized uses of Cariou's photographs—to conduct reminiscent of the Taliban. Brian Boucher, "Injunction in Prince v. Cariou Compared to Taliban in Appeal," Art in America, May 21, 2012, available at http://www.artinamericamagazine.com/news-opinion/the-market/2012-05-21/price-cariou-oral-arguments/

Wikileaks disclosures had come with the permission and blessing of the U.S. Government, that would have raised very real skepticism that they truly represented a fully critical and accurate vision of the military's internal communications.

The domain of uses that would be thematically undone by the very act of licensing is relatively narrow and well-defined. By contrast, the number of uses that are expressive enough that their suppression would raise constitutional concerns is sprawling. Others have assayed to describe this latter domain in much detail,[133] and I pause here only to point out a few actual cases that illustrate the capacity of outright copying to enable constitutionally protected expression for speakers. Rebecca Tushnet has articulated three categories of copying as expression.[134] Outright copying can enable self-expression (Hallmark Cards employ someone else's expression to communicate one's own feelings), more effectively persuade others (legal reasoning relies heavily on direct quotation from respected authorities), or reaffirm one's belonging to a particular group (consider recitations of allegiance oaths or sacred prayers).[135] Yet where self-expression entails outright copying—and is therefore likely infringing—users tend to come out second best. In recent years, political candidates including John McCain and Charlie Crist have used popular musical works to express themes from their campaigns. Owners responded in each case by suing for infringement, resulting in settlements and apologies by the candidates.[136] The internet and digital

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[133] *See, generally, e.g.*, Netanel, *Locating the First Amendment*, *supra* note 126.

[134] While the lobby would have been free to restate the candidate's story in their own words, it is not unreasonable to think that this might have diluted their message. Often direct appropriation, particularly of the words of someone you believe in, is an invaluable way of expressing a given message. *See* Rebecca Tushnet, *Copy This Essay*, 114 YALE L.J. 535, 566-67 (2004) ("Copying can serve as self-expression, using the most apt words to explain and define beliefs and thoughts; it can assist persuasion, using the best words to reach a particular audience; and it can work as affirmation, a way of connecting to a larger group.").

[135] Tushnet, *supra* note at 562-82.

[136] David Byrne of the Talking Heads sued Florida candidate Charlie Crist for his unauthorized use of "Road to Nowhere" in campaign stops, seeking $1m in damages. Crist settled the lawsuit and publicly apologized to Byrne. http://www.billboard.com/news/david-byrne-sues-florida-gov-charlie-crist-1004093436.story. Jackson Browne sued John McCain for unauthorized use of his musical work "Running on Empty" in campaign stops, also resulting in a settlement and public apology. http://www.techdirt.com/articles/20090721/1545365612.shtml

media have enabled expressive copying to an extent unfathomable when the 1976 Act was passed, with the result that much expression that takes place online likely counts as both protected speech as well as copyright infringement. The website Pinterest, for example, permits users to construct "pinboards" (personal pages) that re-post from sites around the internet images that the user likes, and that are then sorted into different categories for other users to view, comment on, and perhaps re-pin themselves.[137] In the aggregate, a user's pinboard tells a deeply personal story about their preferences and identity. But it's also a locus of countless possible infringements, since Pinterest pinboards can contain hundreds or even thousands of verbatim, unauthorized public displays of copyrighted works.[138]

Copyright infringement may be efficient under conditions that are exogenous to licensing markets. Where the costs of subjecting a particular use threaten to overwhelm the gains produced by commercial exchange in the work, permitting infringement rather than allowing owners to block the use may enhance social welfare. This may occur in one of two cases. First, the mere act of seeking permission for a use may undermine the value of that use itself, threatening entire genres with extinction, as illustrated by the example and cases about transgressive contemporary art. And second, requiring users to obtain (and, typically, pay for) permission to engage in uses that are also core exercises of constitutional rights under the Speech Clause highlights the tension between copyright and free speech that

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This example illustrates that the expression entailed in unauthorized use can cut in both directions—a political candidate might claim a speech right to use a musical work without permission, but at the same time, the owner of that speech might counter that the unauthorized use in a political context of which they do not approve amounts to coerced speech. Of course, since that speech is not being coerced by the state, it may not rise to the level of constitutional concern. *Cf.* West Va. Bd. of Educ. v. Barnette, 319 624 (1943) (holding that the Speech Clause prevents public schools from being able to require students to say the Pledge of Allegiance or to salute the flag).

[137] http://pinterest.com/

[138] *Cf.* Kirsten Kowalski, Why I Tearfully Deleted my Pinterest Inspiration Boards, Feb. 24, 2012, *available at* http://ddkportraits.com/2012/02/why-i-tearfully-deleted-my-pinterest-inspiration-boards (blog posting from a lawyer who is also a photographer and Pinterest user explaining that she took down her Pinterest pinboards due to a concern about copyright infringement as well as out of respect for photographers' moral rights); *see also* emails from Kirsten Kowalski, on file with author (discussing this issue further).

has increasingly concerned commentators and some courts for over a decade. This problem arises in contexts that are ever more numerous as culture and technology make self-expression through verbatim copying both increasingly compelling and readily available.

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So far, this Article has focused on what efficient copyright infringement is. Before moving on to the third and final Part of this Article, I pause briefly to observe what it is not. Identifying the relatively rare number of cases in which unauthorized use enhances social welfare should not detract from the fact that most infringement is consumptive, not productive use. Much purely consumptive use is almost certainly socially costly and there is no warrant for its toleration by courts or society.[139] Most unauthorized p2p filesharing of copyrighted sound recordings, for example, represents a deadweight loss for society. Owners lose royalties to which they're entitled, musicians are de-incentivized, and except in sparing cases, no rationale justifies users' unauthorized acquisitions of the works.[140] Nor is this argument in favor of efficient copyright infringement an unqualified defense of unauthorized appropriation and remix culture. "Information wants to be free" is a rallying cry for many, but neither makes good policy nor accurately reflects the content of law. Unauthorized use of copyrighted works of authorship can be justified on an efficiency theory not only where the use is welfare enhancing, but also where some reasonable justification exists for not going the standard route of licensing. Hence an unauthorized low-value sample of a sound recording might be permissible on a transaction-cost theory, but a sample for a mainstream, high-budget release by a major record label that has both plenty of money and knowledge about how industry works would not.

III. THE LAW OF EFFICIENT COPYRIGHT INFRINGEMENT

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[139] *But cf.* KATYAL & PENALVER, *supra* note 12 (arguing that mass online disobedience in the form of widespread filesharing can send a powerful message about changing social norms about copyright, leading to productive dialogues and social change).

[140] *See* Sony BMG v. Tenenbaum, 721 F. Supp. 2d 85 (D. Mass. 2010) (rejecting a fair use argument in defense of p2p filesharing, albeit also expressing reservations about draconian statutory damages).

The previous two Parts described efficient copyright infringement as a matter of theory. But how does this general idea translate into law? This Part answers that question in two steps. First, it examines how the Copyright Act's user-oriented limitations on exclusive rights do not match up with the account of efficient copyright infringement articulated above. And second, it explores a variety of ways in which damages for unauthorized use might be modified to better adjusted to account for efficient copyright infringement.

A. Efficient Infringement and the Copyright Act

The Copyright Act is not unequivocal in its condemnation of unauthorized use. It does assay in several places to create exceptions to the general principle that owners enjoy exclusive rights to use their works.[141] The most familiar such exception is writ large: Section 107's provision immunizing fair use from infringement liability.[142] Many others are writ small, such as section 110's finely targeted subject-matter specific exemptions,[143] or at least smaller, such as section 109's first sale doctrine.[144] With all these user-friendly carve-outs, one might wonder whether there's not already a doctrine of efficient copyright infringement scattered throughout Title 17. As the ensuing subpart explains, while the Copyright Act takes account of the upside of copying in some ways, both doctrinal narrowness and practical hurdles to enforcement undermine the Act's capacity to fully effect an efficient infringement regime.

Begin with fair use. This longstanding defense to copyright infringement permits those faced with infringement a full defense

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[141] Indeed, sections 107-122 of the Copyright Act comprise various exceptions to owners' exclusive rights.

[142] 17 U.S.C. sec. 107 (outlining four mandatory factors courts must consider in order to determine whether an otherwise infringing work is permissible as a fair use: the purpose and character of the use; the nature of the copyrighted work; the amount of the work used; and the effect of the use on current or future markets for the work).

[143] 17 U.S.C. sec. 110(1) (immunizing from infringement liability public performances of copyrighted works of authorship in the course of "face to face teaching").

[144] 17 U.S.C. sec. 109(a), 109(c) (immunizing from infringement liability public distributions or displays of copies following their initial valid acquisition).

(and, effectively, a zero-cost compulsory license to use the owner's work) if they can show that an on-balance consideration of four statutory factors favors their use. The fair use test embodied in section 107 seeks to consider, among other things, aspects of the social value generated by an unauthorized use (including increasingly exclusive attention to whether a use is transformative)[145] as well as the costs of the use on the work's owner.[146] The fair use provisions are meant to operate as a safe harbor for many of the unauthorized uses that enhance social welfare. Yet due to both the defense's relatively limited substantive scope, as well as to pragmatic hurdles associated with its enforcement, section 107 falls short of the aspiration of effecting an efficient copyright infringement system.

First, fair use itself has grown underinclusive. While it was first conceived as a broad common law defense that operated to assure that copyright enforcement did not undermine the public interest, its development has, in many respects, expanded owners' rights at the expense of users' prerogatives.[147] Part of this problem is rooted in the natural-rights view of copyright on which fair use is premised. By positioning fair use as an exception to an otherwise broad owner's suite of rights in the copyrighted work, the doctrine seems to suggest that all that is not fair use is infringement.[148] This is inconsistent with the Framers' original vision of copyright, pursuant to which an owner's monopoly extended only as far as was necessary to encourage an optimal level of creative production.[149]

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[145] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding that transformative uses are more likely to be fair); *see also* Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (elaborating the notion of transformative use).

[146] Factor four considers the harm inflicted by the unauthorized use on the current or future value or market for the work. 17 U.S.C. sec. 107(4) (requiring courts to consider the "effect of the use on the potential market for or value of the copyrighted work").

[147] John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005) (arguing that the emergence and codification of fair use expanded owners' rights at the expense of users' rights).

[148] *See* Tehranian, *supra* note at 480-92 (arguing that fair use expanded owners' rights by entrenching a natural-rights view of copyright).

[149] *Id.*

Relatedly, fair use's reputation as notoriously open-ended[150] has caused judges to cast about for particular bright-line rules on which to determine their analysis. So, for example, the emergence of transformativeness as the dominant criterion of factor-one analysis[151] has caused judges to conclude that any use that any use that is not transformative is unfair, thereby excluding from the ambit of fair use even highly expressive (even if not transformative) unauthorized uses.[152] Similarly, in *Acuff-Rose*, the Court established a rough rule of thumb to help organize fair use analysis: Parodic uses tend to be more likely to be transformative than satirical ones.[153] But courts, in their desire to make sense of the balancing-test soup that is the fair use test, have transformed this rough rule of thumb into a the parody/satire distinction as the inflexible, binary driver of the factor one analysis, so that many courts evaluate fair use almost entirely in terms of whether a work is a parody (and hence fair) or a satire (and hence unfair).[154]

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[150] Academics love to come up with the most poetic way to describe fair use's indeterminacy. David Nimmer remarked that expecting certainty from the fair use factors is "naught but a fairy tale." David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 287 (2003). And Jessica Litman colorfully characterized much of copyright law, but especially fair use, as nothing but "billowing white goo." Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008). Others, though, have questioned whether fair use is as indeterminate as commentators typically think. See Pam Samuelson, Unbundling Fair Uses, 77 Fordham L. Rev. 2537 (2009) (arguing that most fair use cases fit into one of several categories, and that fair use thus is more coherent and predictable than most commentators believe).

[151] Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011) (reporting results of an empirical study showing that "since 2005 the transformative use paradigm has come overwhelmingly to dominate fair use doctrine").

[152] *See* Tushnet, *supra* note 134 at 582-86.

[153] *Acuff-Rose*, 510 U.S. at 580-81.

[154] *E.g.*, Burnett v. Fox, 491 F. Supp. 2d 962 (C.D. Cal. 2007) (finding that Family Guy reference to Carol Burnett was fair use based almost exclusively on the basis of its status as parody, not satire). A court could not rely exclusively on the parody/satire distinction, since section 107 requires consideration of all four fair use factors. As the foregoing example illustrates, though, judicial decisions about fair use often focus primarily and dominantly on parody/satire by resolving each of the four factors in light of parody/satire analysis. *E.g., Burnett*, 491 F. Supp. 2d at 971-72 (concluding that factor four weighs in favor of fair use because the use was a parody, and thus did not threaten potential markets for or values of the work).

Second, the social perception of the fair use defense as vague[155] combined with the Copyright Act's stiff penalties for infringement[156] creates a double bind for users. Even if a use is likely fair, the doctrine's vagueness always leaves open the possibility that a court may rule otherwise. Users[157] thus have to choose between engaging in the use, and tolerating some scary risk of massive liability, or foregoing the use to which they are likely entitled. Given that many productive uses generate relatively low (although not necessarily unimportant or trivial) social value, and that many creators of such lower-value uses are impecunious (or aren't even creating out of a desire for pecuniary gain), even low-probability threats of massive liability are likely to deter them.[158] The result of this dynamic is that fair use tends to grow ever smaller, and owners' rights ever greater, both in practical terms and as a matter of law.[159]

The examples used throughout Part II illustrate fair use's underinclusiveness as well as the risk aversion issues it raises. Fair use tends to prefer transformative uses, but the Part II examples (the legal services provider's reprinting of a full article, the lobbying group's reproduction of large sections of the politician's bio) involve verbatim reproduction of all or at least part of the owners' works. Fair use tends to favor uses that aren't commercial, but the Part II examples (the mashup DJ's remix, the emo artist's derivative works) were created for some, though not a lot of, profit. Fair use tends to favor uses that don't harm the market for or value of the original, but the owners in each of the Part II examples can cook up an argument that the uses

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[155] Judges love remarking on fair use's indeterminacy as well, and have for some time. *E.g.*, Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1929) (describing fair use, even before its codification, as "the most troublesome doctrine in the whole of copyright law").

[156] 17 U.S.C. sec. 505 (authorizing judgments of up to $150,000 in statutory damages for a single act of willful infringement).

[157] At least, that is, users who are aware of their infringement. Many lay consumptive users may not be aware of the countless ways in which they infringe copyright. For an entertaining summary of how common infringement is in daily life, see generally JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU (2011).

[158] *See* David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139 (2009) (arguing that fair use's vagueness tends to deter reasonably risk-averse users).

[159] Jim Gibson, *Risk Aversion and Rights Accretion*, 116 YALE L.J. 882 (2005) (discussing how the vagueness of fair use in combination with high copyright penalties tend to expand owners' rights at the expense of users).

could theoretically (even if not in fact) been licensed.[160] Finally, none of the uses in Part II's examples counts as a parody, the category that many judges have come to treat as per-se fair use. The closest case is the appropriation artist's collage, but that work seeks to mock not the infringed work, but some other subject, which makes the use a satire—a category of work that has grown so disfavored by courts as to be per se unfair.[161] And while there remains a colorable argument that these uses might be fair, the cases are close enough that a reasonably risk-averse user would likely not want to risk infringement damages, and would thus avoid the uses outright.

Fair use, though, represents only one aspect of the Copyright Act's available defenses for unauthorized use. On the other end of the spectrum from fair use's capaciousness are the many narrowly drawn use exceptions of which Section 110 furnishes a useful illustration. Section 110 immunizes from liability, among other things, public performances of copyrighted works made for in-person education,[162] of nondramatic musical or literary works in the course of religious services,[163] or within certain small-scale commercial establishments.[164] As these few examples illustrate, these granular exemptions exhibit just the opposite problem of fair use. While they are specific enough to raise few questions as to the scope of their applicability, their narrowness provides only a small, targeted range of protected uses.

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[160] Indeed, courts tend to base factor four analyses primarily on the theoretical availability of licensing, not the actual existence of a properly functioning licensing market. *Compare* Am. Geophysical Union v. Texaco, 60 F.2d 913, 929-31 (2d Cir. 1995) (finding that photocopies of scientific journal articles were not fair use because a new mechanism for licensing photocopies existed) *with id.* at 936-39 (Jacobs, J., dissenting) (observing that the purported licensing scheme was so imperfect that it did not provide a meaningful opportunity to acquire a valid license).

[161] *See, e.g.*, Dr. Seuss Enters. v. Penguin Books, U.S.A., Inc., 109 F. 3d 1394 (9th Cir. 1997). Courts typically cite *Acuff-Rose* for the proposition that satire is per se not fair use, *e.g., id.* at 1400 (quoting *Acuff-Rose*, 510 U.S. at 580), but this reading is doubly mistaken. First, the *Acuff-Rose* Court said only that parody is more likely to be fair use than satire, not that the latter can never be fair use. 510 U.S. 580-81. Second, the parody/satire distinction is only relevant to factor one analysis, so even if a use's status as satire causes a single factor to weigh in favor of infringement, that does not mean the other three factors could not on-balance result in a finding of fair use.

[162] 17 U.S.C. sec. 110(1).

[163] *Id.* sec. 110(3).

[164] *Id.* sec. 110(5).

As the foregoing discussion illustrates, the failure of current law to account for efficient copyright infringement can be disaggregated into two types of shortcomings: scope and coherence. Fair use's scope causes it to match weakly with efficient infringement. This breadth has had the ironic result of causing judges to narrow the doctrine in their search for a single determinate fair use touchstone. The doctrine's vagueness has also led risk-averse users to be ever charier of unauthorized use in the face of some possibility of massive liability. By contrast, the scope of the Copyright Act's other exemptions is simply too narrow to capture the full range of efficient, but unauthorized, uses. This narrowness is unsurprising since many—perhaps most—of the exemptions in section 110 and elsewhere in Title 17 are the products of legislative compromise and interest-group pressure rather than a thoughtful balancing of private and public interests.[165]

And while their failings in terms of scope are different, each of these sections shares a similar lack of coherence in terms of what kinds of uses it prefers to permit, and under what conditions it seeks to permit them. Fair use's variety of factors do not give a coherent vision of the kind of unauthorized uses that merit exemption, while a different kind of mismatch—one that is too focused, rather than sprawling—results from the disconnected, granular exemptions scattered throughout the rest of the Copyright Act. Nor do any of these exemptions completely account for the possibility that even welfare-enhancing unauthorized uses may create even more welfare if the user simply purchases a license. Some well-capitalized fair users or business owners may be perfectly able to pay for a license to use a copyrighted work, though they need not under section 107 or 110. The ensuing section seeks to imagine what it might mean for law to exhibit more fidelity to efficient copyright infringement along the axes of both scope and coherence.

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[165] For example, when film producers brought a legal challenge against "CleanFlicks" DVD players that automatically expunged adult-themed aspects of films during home playback. Congress responded to pressure from the religious right to pass an amendment to the Copyright Act specifically to immunize CleanFlicks technology from infringement liability. *See* 17 U.S.C. sec. 110(11) ("CleanFlicks" exemption). *See also generally* LITMAN, *supra* note 35 (paperback ed. 2006) (discussing the massive influence of lobbying groups, especially content industries, on the legislative process of copyright law).

B. Imagining a law of efficient copyright infringement

Part III.A's discussion of the Copyright Act's shortcomings does two things. First, it highlights the continued need for law to better account for efficient copyright infringement, despite the presence of doctrines that make some effort along those lines. And second, it helps frame how law should (and should not) seek to address this problem. Part III.B seeks to start a discussion along those lines. The goal of this Subpart is not (and, given space constraints and law's inevitable imperfections, cannot be) to produce a silver-bullet legislative proposal that will tolerate all unauthorized uses that are welfare-enhancing while excluding those that are not. Rather, it seeks to develop a conceptual sketch rather than a detailed blueprint of the first steps and core principles law might take in creating a doctrine of efficient copyright infringement. The Subpart takes the form of a thought experiment that asks how copyright remedies might be modified to make infringement more efficient, and explores three different answers.

1. Eliminating Statutory Damages and Infringer's Profits

As discussed earlier, one of the features that currently prevents copyright's remedies system from approaching efficient breach in contract is the variety of monetary damages available to prevailing plaintiffs. Owners who successfully show that their work has been infringed are entitled not only to recover their expected losses (actual damages) but, alternatively, the defendant's profits or statutory damages.[166] The first option for enabling efficient infringement, then, is a relatively simple statutory fix: Eliminate defendant's profits and statutory damages as remedies for copyright infringement.

A quick example illustrates how this would change—and possibly make more socially beneficial—the infringement calculus. Under current law, a user who wants to make a use of a copyrighted work of authorship that will earn $100,000 in profit, but who cannot

[166] 17 U.S.C. sec. 504(b) (defendant's profits or owners losses), 504(c) (statutory damages).

secure a license, will forego that use due to the threat of infringement liability. Losing an infringement suit would subject him to at least a complete loss of any profits, and as much as $150,000 in statutory damages (if the work is registered and a judge regards it as willful infringement). But in a world without infringer's profits and statutory damages as remedies, prevailing plaintiffs would be able to recover only the amount they actually lost due to infringement. Here, that would likely amount to the cost typically charged for a reasonable royalty. It is certainly possible that the owner might have expected a royalty of over $100,000 for this use,[167] but in that case, the user would have been wise to forego the losses associated with the project in any event.

The appeal of eliminating infringer's profits and statutory damages is that it more closely calibrates recoveries in infringement suits to the actual costs to owners—hence plaintiff's losses are often referred to as "actual damages" even under current law.[168] It also eliminates the ability of owners to threaten small-scale users with massive statutory damages awards in order to force settlements that bear no proportion to the actual social cost inflicted by infringement. The practice of "copyright trolling," most famously implemented in recent years by Righthaven, could not exist unless owners (and their agents) could intimidate bloggers and other inadvertent, small-scale infringers with the possibility that they might suffer a six-figure damages award if they did not settle.[169] Limiting copyright's monetary remedies to a plaintiff's actual damages would cause those remedies to track the basic model of recovery in other property tort cases: you recover the costs that the defendant's injury inflicted on you. It would also allow productive users would be allowed to keep any social value they created, providing a valuable incentive for such uses.[170] For their

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[167] Film option rights for a highly successful novel, for example, may well exceed this amount.

[168] Venture Tape Corp. v. McGills Glass Warehouse, 540 F.3d 56, 63 (1st Cir. 2008) (using "actual damages" synonymously with "plaintiff's losses").

[169] *See* Kurt Opsahl, Facing Down a Copyright Troll in Federal Court, Wired.com, Feb. 6, 2013, *available at* https://www.eff.org/deeplinks/2013/02/facing-down-copyright-troll-federal-appeals-court.

[170] And it might provide a valuable incentive for owners of works to engage in more productive uses themselves, rather than waiting for someone else to do it and reap the profits.

part, owners would to seek recovery for infringement only where filing suit turned out to be a value-positive proposition for them, eliminating the possibility of recoveries out of all proportion with the actual costs of infringement.[171]

This alternative sounds appealing where we assume either that the use at issue is so socially productive that its deterrence by statutory damages is inefficient, or where it is so trivial that imposing up to six figures in statutory damages seems to give owners a windfall as well as disproportionate bargaining power. But flipping the infringement script in this manner may place owners, rather than users, in a position of weakness, with possible deleterious effects. For one thing, eliminating statutory damages and infringer's profits as damages options essentially converts copyright from a property rule regime to a liability rule regime. Users would be free to engage in unauthorized exercise of owners' exclusive rights so long as they pay a court-imposed royalty down the road. This would have the concerning effect of essentially stripping from owners any control over their work.[172] Publishers could print unauthorized copies of their competitors' works, recording companies could release their competitors' sound recordings, and movie theaters could show whatever films they wanted—all subject only to the possibility that they might be forced to pay the fair royalty they would have owed anyway.[173]

Two more issues further complicate the story of this approach's appeal. For one thing, limiting copyright damages to plaintiff's losses may have the perverse effect of driving up the costs of licensing considerably. Since a primary measure of actual damages is an owner's lost royalties,[174] owners would have a strong incentive to

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[171] *E.g.*, Capitol Records v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010) (reducing statutory damages award against defendant who illegally shared 24 sound recordings via p2p network from $1.9 million to $54,000, and explaining that the former amount of damages was "monstrous and shocking" as well as a "gross injustice" when compared to the actual gravity of the infringement).

[172] It would also eliminate the "intended deterrent effect" of statutory damages that the Copyright Act's framers intended. H.R. Rep. 94-1476 at 163.

[173] Although these unambiguous case of infringement would almost certainly likely result in a favorable judgment, it's not certain that an owner would seek damages, especially in light of the high costs of enforcing suits.

[174] *See* Gaylord v. U.S., 678 F.3d 1339, 1343 (Fed. Cir. 2012) ("When … the plaintiff cannot show lost sales, lost opportunities to license, or diminution in the

raise the costs of the royalties they actually charge so that they can credibly claim high actual damages in the event that they prevail in an infringement action. And the cost and uncertainty associated with litigation would mean that actual damages would never truly fully compensate prevailing owners. This concern is especially salient with respect to smaller-scale infringement. Consider a record label's position with respect to Limewire users who download even several hundred tracks. Suing and winning against such users would net actual damages only in the amount of the reasonable royalties the users should have paid, which would total at most around $1000 even in the case of high-volume unauthorized downloading. That recovery would hardly justify the time and trouble of litigation, even if the user (as the losing party) bore the record company's attorney's fees.

One final factor that remains to consider when evaluating the potential impact of limiting copyright damages is the role of non-monetary remedies, particularly injunctive relief and attorney's fees. Retaining these remedies might rein in the specter of an infringement free-for-all in a world without statutory damages. The presence of injunctive relief and attorney's fees may deter rampant infringement even absent statutory damages, considering that even small-scale users could face massive adverse fee awards even if the actual damages they owed to the prevailing plaintiff were low. The presence of injunctive relief, though, may undercut the capacity of this revision to enable an efficient infringement regime. Getting rid of statutory damages might limit the financial impact of adverse judgments on those who made highly productive and socially valuable unauthorized uses of works of authorship. But if owners could permanently enjoin the future exploitation of the work, then both the user and the public would be deprived of the value created by the unauthorized use.

2. Expanding statutory safe harbors

As discussed above, the Copyright Act creates some affirmative defenses for otherwise infringing conduct. While one is highly general (fair use), most are targeted to particular kinds of uses (e.g., first sale, section 110). Another possible way to facilitate efficient copyright infringement may be to create more general

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value of the copyright, many circuits award actual damages based on the fair market value of a license covering the defendant's use").

statutory safe harbors that, like fair use, immunize broad swaths of otherwise infringing use from liability. For example, Congress could amend the Copyright Act to include an affirmative defense to infringement where search costs associated with licensing a work are particularly high. Take, for instance, the search-costs problem of "orphan works." These are works that bear no indicia of authorship, forcing would-be users to either forgo using the work or risking possibly immense damages. Legislation was proposed years ago to remedy the this concern. The proposed bill (which never got out of committee) would have limited the infringement damages available to plaintiffs where defendants "performed and documented a reasonably diligent search in good faith to locate the owner of the infringed copyright," but were "unable to locate the owner."[175]

We can imagine other statutory safe harbors that sweep even more broadly and address some of the other efficient infringement scenarios discussed in the previous Part. The Copyright Act could broadly immunize from liability infringement that is necessary to exercise rights under the Speech Clause of the U.S. Constitution's First Amendment. A statutory provision could also create a safe harbor for uses where owners' enforcement is contrary to the constitutional aspirations expressed in the Progress Clause. These latter two examples already have some presence in copyright law. In *Eldred*, the Supreme Court acknowledged the tension between the First Amendment and copyright, and raised the possibility that laws enhancing owners' rights could run afoul of the First Amendment's Speech Clause if they do not alter "traditional contours of copyright protection."[176] And courts have adapted the common law defense of estoppel to into a copyright misuse doctrine. On this theory, owners are precluded from enforcing their exclusive rights where the exercise of those rights undermines other policies of the law, such as antitrust or—in one case—the Progress Clause's policies of promoting creative and inventive expression.[177] Codifying these free-floating notions in

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[175] Orphan Works Act of 2006, H.R. 5439 sec. 514(a)(1)(A) (proposed May 22, 2006), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5439.

[176] 537 U.S. 186, 221 (2003).

[177] Assessment Techs. of Wis., LLC v. WIREdata, Inc., 350 F.3d 640 (7th Cir. 2003); Shloss v. Sweeney, 515 F. Supp. 2d 1068 (N.D. Cal. 2007) (refusing to enforce a copyright where its owner aimed to undermine copyright's policy of encouraging "invention and creative expression").

the Copyright Act would bring stability and certainty to an otherwise open-ended doctrine. Courts have thus far only hinted at defenses to infringement based on the Speech Clause or copyright misuse on a Progress Clause theory.[178] Writing these doctrines into federal law would replace common-law judicial hesitance with a strong, clear affirmance of the vitality of these defenses. Codification may also provide a focal point for litigants, encouraging defenses on Speech or Progress Clause theories that defendants have thus far hesitated to take seriously in light of courts' ambivalence about them.[179]

Several concerns accompany the promise of codifying users' safe harbors in the interest of facilitating efficient copyright infringement. The values of the Speech and Progress Clauses are drawn at such a high level of generality that merely stating the availability of these defenses would give judges and litigants little guidance about how they should play out in specific cases. And even if judges were able to craft limiting and clarifying principles that provided some determinacy to these defenses, risk-averse users may well steer clear of invoking them given the high costs of litigation and liability. Just as with a use that is likely but not certainly fair, a use that is likely but not certainly within a constitutional safe harbor carries with it a risk of damages so high that it may deter the use altogether.

And safe harbors that entirely immunize users from infringement liability fall short of effecting efficient infringement also because owners receive no recompense for the role their work played in the success of a use. Efficient breach is attractive because neither promisees nor promisors lose the benefit of the bargain. But statutory safe harbors mean that owners lose completely because they get no

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[178] Indeed, the Court seems to have cabined the notion of a Speech Clause defense to copyright expansions significantly in *Golan v. Holder*, holding that copyright laws cannot violate speech rights given the presence of speech safeguards like fair use and the idea/expression dichotomy. 132 S. Ct. 873, 890-91 & n.30 (2012). And there is as yet just a single federal court decision precluding an owner's enforcement of their copyright on the theory that it violates copyright's pro-dissemination and –creation policies. *Schloss*, *supra* note 177.

[179] This was the case with the fair use defense, which existed as a general common law doctrine prior to its codification in the 1976 Act. *See generally* Richard McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (discussing law's capacity to create focal points that organize actors' expectations).

royalties, while users get the entire value of the work as an input for free. This outcome may work when the use is a necessary incident to a constitutional right, since we typically think of rights as trumping countervailing economic considerations. But as a matter of balancing owners' and users' concerns, statutory safe harbors (whether fair use or the ones suggested in this Subpart) may stack the deck too strongly in the latter direction.

3. Ex post compulsory licenses for productive uses

This Subpart concludes by exploring a final doctrinal option for implementing efficient copyright infringement: ex post compulsory licenses. Current law makes unauthorized use an all or nothing gamble. If a given unpermitted exercise of an owner's rights in their work is fair, then users are permitted to engage in the use, free of charge. But if that use is not fair, and not otherwise subject to an affirmative defense, then users face the Copyright Act's full arsenal of remedies, including six-figure statutory damages for willful infringement. Compulsory licenses provide a way to mediate between these two extremes, by allowing users to exploit works of authorship without owners' permission, while still requiring that they pay owners for the privilege.[180]

The primary knock on compulsory licenses is that ex ante ratesetting tends to correlate weakly at best with the real value of the owner's work as an input to the use. Such licenses will almost always overvalue, or (more plausibly) undervalue the use of the owner's work in the context of the new use.[181] Consider, by contrast, how an ex post compulsory license would work. Such a license would not fix beforehand a rate for a given use. Instead, it would assess the value of the license after the use, based on the profit earned by the unauthorized use. Consider a simple example: The Copyright Act could allow users to make new works of authorship based on

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[180] *See* Alex Kozinski & Chris Newman, What's So Fair About Fair Use? 36 J. Copyright Soc'y U.S.A. 167 (1999) (proposing ex ante compulsory licenses for derivative works).

[181] For example, the Copyright Act permits users to make cover versions of musical works so long as they remit a royalty of a mere 9.1 cents per copy of each cover sold to the musical work owner. 17 U.S.C. sec. 115; *see* U.S. Copyright Office, "Mechanical License Royalty Rates," Jan. 2010, *available at* http://www.copyright.gov/licensing/m200a.pdf.

preexisting works, pursuant to a requirement that the users remit to the preexisting work's owner a 10% royalty share of all sales and licensing fees from the new work.[182]

The advantages of this approach are several. Unlike existing (and proposed) statutory safe harbors, it does not create a winner-take-all game. Rather, it permits users to freely create follow-on works based on existing, copyrighted works of authorship, but it assures that owners of those preexisting works will receive some recompense for the role their work played in the new one. If the new work is a blockbuster (e.g., a highly successful cover version of a previously obscure musical work), this would be a windfall for the owner—they would get 10% of the copy sales and licensing fees thanks to another person's creative efforts. But if the follow-on work is not for profit (e.g., fan fiction based on a TV show), the user need not worry about a crippling infringement judgment, and the owner would likely not have lost out on a meaningful license fee anyway.[183] Moreover, unlike simply getting rid of statutory damages and infringer's profits, an ex post compulsory license would not require owners to bear the costs and uncertainty of litigation in order to recover what users owed them. And finally, an ex post compulsory license (unlike an ex ante one) would not function as a mere price ceiling for unauthorized use. Rather, it would provide a guaranteed royalty stream to owners, so that as new works resulting from productive uses earned more money, so would the owner of the underlying work.

Ex post compulsory licenses do come with their own unique set of concerns, though. The most obvious question is how the process of ratesetting and compensation would be administered. The most immediate answer is that all of these functions could be carried out with existing administrative apparatus, such as the Copyright Office

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[182] This approach has an analog in physical property law, where wrongful possessors are sometimes allowed to retain title to their improvements provided that they pay the owner for the cost of the input. *See* Wetherbee v. Green, 22 Mich. 311, 312 (1871) (allowing a good-faith improver of chattel property to keep the resulting goods on the condition that he reimburse the owner for the initial value of the chattels); *but see* Cal. Civ. Code Ann. sec. 1007 (entitling adverse possessors to take title to real property without compensating the owner).

[183] *See* Mark Lemley, The Economics of Improvement in Intellectual Property Law, 75 Tex. L. Rev. 989, 1019-29 (1997) (contrasting the economic value of minor, significant, and radical improvements in copyright law).

(for regulatory guidance) and the Copyright Royalty Board (for setting rates). And as with other large-scale licensing endeavors, private organizations could spring up to more efficiently handle the interface between users and owners.[184] A corollary problem is what kind of uses would be subject to the compulsory license. A practical limit on this could be to make only productive uses, such as where a user creates a new work based on actual incorporation of a preexisting work, subject to the ex post compulsory licensing regime. Such an approach would provide a cognizable limit to the scope of works affected by this regime, but it would inevitably be to some extent underinclusive. It would not compensate owners whose works strongly influence, even if they are not incorporated directly into, a new work. Nor would it include in its scope the many users who make socially valuable verbatim reproductions of works, such as interoperative devices like DVRs or archives like Google Books.

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This Part has explored efficient copyright infringement along two dimensions: How current law accounts for this notion, and how it might do so more effectively. There are elements of the Copyright Act that seek to tolerate socially beneficial infringement, but they tend to be undone by their perceived doctrinal vagueness or their substantive underinclusiveness. How might law craft remedies to better reflect efficient copyright infringement? This Part answered that question with a thought experiment rather than a single proposal. The simplest fix might be to simply eliminate all monetary remedies other than plaintiff's damages, effectively converting copyright into a liability rule rather than a property rule regime. Or, Congress could add more statutory safe harbors like fair use, immunizing from liability otherwise infringing conduct that is associated with high transaction costs, free speech rights, or owner conduct that undermines the aspirations of the Progress Clause. Finally, ex post compulsory licenses would require more administrative apparatus, but would produce a close fit between owners' and users' interests in the case of

[184] For example, most section 115 compulsory licenses for mechanical reproductions of musical works in phonorecords are administered privately by the Harry Fox Agency rather than via the formal procedures outlined in the statute. http://www.harryfox.com/index.jsp.

productive unauthorized use. Nor are these schemes mutually exclusive. The best approach might be to draw from each of them.

CONCLUSION: BEYOND EFFICIENT INFRINGEMENT

Efficient copyright infringement is at once counterintuitive and intuitive, familiar and foreign. That copyright infringement can be efficient challenges our instincts about the wrongfulness of unauthorized use of property—instincts that transcend, if imperfectly, the distinction between tangible and intangible property. Popular culture casts infringers as villains—ruinous "pirates" in the common parlance of IP rhetoric—whose transgressions against owners threaten to deprive them of hard-earned and well-deserved economic remuneration.[185] This reaction derives at least in part from a strong moral instinct that begins from the intuition that unauthorized use of another's intellectual property is intrinsically wrong, and proceeds to conclude that such wrongful behavior must be socially destructive.[186] Neither Madison's happy account of public/private interest convergence, nor our innate sense that property should remain inviolate seem to leave any room for the notion that copyright infringement might do good rather than ill.

Yet while our instincts may reject efficient copyright infringement at a high level of generality, they can embrace it in particular instances. Consider, for example, the uniformly outraged reaction when ASCAP sought to make the Girl Scouts of America pay royalties for singing campfire songs.[187] A similar reaction accompanied Diebold's attempt to use copyright to suppress public exposure of internal memos detailing its involvement in election

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[185] *See* David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 666-67 (2010) (observing that popular-cultural critics have derided infringers as pirates and communists, and have suggested that their conduct is sacrilegious).

[186] *See* Haidt, *supra* note 51 (summarizing studies showing that actors who have negative moral instincts to conduct strongly tend to assume that the conduct must be socially costly, even when told otherwise).

[187] *See* Elisabeth Bumiller, *Ascap Asks Royalties From Girl Scouts, and Regrets It*, N.Y. TIMES, Dec. 17, 1996, *available at* http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html.

fraud.[188] And while content industries railed against (and still express understandable concern about) unauthorized filesharing on p2p platforms, some users celebrated the conduct as an important, rebellious social statement.[189] Here, and in numerous other cases, intuitive popular sentiment ran in favor of infringement. Many factors underlie these reactions. They may have derived from instinctive distaste for corporate-monolith copyright owners or a dislike of aggressive enforcement tactics against apparently innocuous groups. But these reactions are explicable at least in part also because the owners seem to be suppressing prosocial, if unauthorized, uses of their works. We may reject efficient copyright infringement as an idea, but we know it when we see it—and often, we like it—in practice.

This divergence may be explained in part by the unfamiliarity of efficient copyright infringement as an available social trope. Search Google for the phrase and you'll get less than a full page of hits—most of which refer to p2p filesharing devices that are "efficient copyright infringement machines."[190] The term has never been invoked by federal courts and shows up exactly once in law reviews, again in the context of an entirely unrelated usage.[191] So perhaps the instinctive resistance to efficient copyright infringement simply derives from the unavailability of this idea in our cultural discourse. And yet here too, the unfamiliarity of this idea as a social notion is belied by the numerous instances in which we tolerate and even champion particular instances of unauthorized use because they enhance social welfare. Fair use may be vague and underinclusive, but courts still sometimes rely on it to save unauthorized users from massive infringement

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[188] *See* PENALVER & KATYAL, *supra* note 12 (discussing negative public reaction to Diebold's aggressive enforcement of its copyright in an attempt to keep its internal memos secret).

[189] *Cf.* PENALVER & KATYAL, *supra* note 12 (discussing social support for unauthorized filesharing via p2p platforms, and suggesting that such conduct has at least some socially positive effects in terms of signaling changing social norms about the appropriate scope of copyright protection).

[190] The rest of which are references to this paper.

[191] Based on Westlaw and SSRN searches performed August 7, 2012, the only use of the term "efficient copyright infringement" appears in Tiffany A. Parcher, Comment, *The Fact and Fiction of Grokster and Sony: Using Factual Comparisons to Uncover the Legal Rule*, 54 UCLA L. Rev. 509 (2006) ("How much can warnings, disclaimers, and alert windows indicate good ethics when they accompany a product that is, in effect, a highly efficient copyright infringement machine?").

verdicts.[192] And scholars may not have articulated a general theory of efficient copyright infringement, but much recent work in the field identifies and defends particular instances of unauthorized use,[193] and critiques the market failure that prevents the copyright system from realizing the maximum level of cultural production.[194]

This Article has sought to resolve these tensions, and to synthesize disparate related strands in the literature, by articulating a novel, unified theory of efficient copyright infringement in three steps. The necessity of articulating this notion at all flows from the premise that it is impossible to know how to set owners' exclusive rights at precisely the level that will optimize cultural production. For this reason, some tolerated theft will always be necessary to reach the goals of the copyright system. Especially because the political economy of copyright skews so strongly in favor of owners, a dialogue that seeks this balance must attend closely to the interests of users, and the public. Describing the domain of socially desirable unauthorized use is relatively straightforward. Where private ordering for acquiring a use license proves unavailable or undesirable, and the use is welfare-enhancing, copyright infringement will be efficient. Translating these ideas into doctrine is challenging, and this Article has sought to explore that issue by means of a thought experiment that imagines how different kinds of remedial modifications—limiting actual and statutory damages, creating doctrinal safe harbors, and establishing ex post compulsory licenses—might make the infringement regime more consonant with copyright's constitutional aspirations.

As the foregoing indicates, this Article's aspiration is both descriptive and normative. But its normative goals extend beyond those articulated in Part III. Introducing efficient copyright infringement matters not only for how we govern ownership in works of authorship, but for social dialogue about the appropriate scope and

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[192] For a very recent example, see *Northland Family Planning Clinic, Inc. v. Center for Bio-ethical Reform*, (C.D. Cal. June 15, 2012) (finding anti-abortion group's use of family planning clinic's advertising materials to be fair, albeit almost entirely on the ground that they were parody not satire).

[193] *E.g.*, Litman, *supra* note 10 (articulating a theory of lawful personal use); Tushnet, *supra* note 134 (elaborating the social utility created by numerous kinds of verbatim copying).

[194] *See* Gordon, *Market Failure*, *supra* note 71; Gordon, *Excuse and Justification*, supra note 88.

scale of copyright protection. As we have seen, violations of property rights in general, and of copyright in particular, often trigger in owners powerful moral reactions out of all proportion with the social costs a given unauthorized entry (or use) may actually inflict.[195] At the same time, the shared human tendency toward strong self-interest leads concentrated, wealthy content industries to lobby Congress—with consistent success—for expansion of owners' rights. And the absence of a well-articulated notion of efficient copyright infringement from black letter law and political discourse exacerbates these tendencies. Merely outlining the contours of efficient copyright infringement may help to check the uncritical expansion of owners' rights by calling attention to efficient copyright infringement as a unified idea, and by pushing back against the notion that all infringement amounts to socially pernicious piracy.

This Article has sought to illustrate the underappreciated social value of copyright infringement. In so doing, it has accepted the foundational assumption that has animated American copyright law since 1790: Exclusive rights in works of authorship, properly calibrated, will optimize creative production.[196] While judges and scholars may disagree about the appropriate way to construct this property-like approach to motivating creation, there is general acceptance that some degree of exclusive rights is necessary to motivate authors and to protect their works.[197] Yet recent work increasingly casts doubt on the assumption that exclusive rights are the only, or even the best, way to encourage creation and invention. Numerous creative industries—such as fashion, cuisine, and stand-up comedy—thrive in the absence of copyright protection, either because

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[195] *See* Fagundes, *supra* note 185 (discussing property's capacity to elicit disproportionately strong moral reactions among laypeople).

[196] The sole focus on this exclusive-rights approach to incentivizing creative production is understandable in light of the Constitution's Progress Clause, which makes "exclusive Right[s]" in works of authorship and inventions the means by which Congress may promote "Progress of Science and Useful Arts." U.S. CONST. art. I, sec. 8, cl. 8.

[197] *See* Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. Rev. 970 (2012) (discussing and critiquing "IP internalism": the notion that property like systems are necessary or optimal ways to motivate creative production); *see e.g.*, PENALVER & KATYAL, *supra* note 12 (highlighting the importance of "altlaws" only as a relatively narrow exception to IP regimes).

social norms take the place of state-created law, or because unauthorized copying actually furthers creative production.[198] And there are plausible alternatives to property-like systems that may promise better ways to motivate creation and invention, such as commons-based production and government procurement.[199]

This Article's discussion of the prevalence of efficient copyright infringement may pose similar questions about the necessity of the IP regime. If much of what we regard as infringement is socially beneficial, this may lead us to question whether it makes any sense to have a system that seeks to penalize and deter such conduct.[200] This, then, is the final and perhaps most counterintuitive implication of this Article: That by introducing into legal and social discourse a notion of efficient copyright infringement, we may come to question the wisdom of the copyright infringement system itself.

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[198] RAUSTIALA & SPRIGMAN, *supra* note 64(enumerating several examples of creative industries that are thriving despite—or perhaps because of—the absence of copyright protection).

[199] Kapczynksi, *supra* note 197 (discussing these alternatives to exclusive IP rights and arguing that they may be superior).

[200] A more modest version of this inquiry would be whether it makes sense to have exclusive rights be the dominant approach to IP production. One could imagine a tiered system where high-production cost entertainment goods like blockbuster movies retain the exclusive rights they need to exist, while experimental or smaller-scale works would be created outside the scope of the IP system.